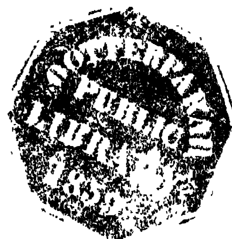


THE

LAW OF EVIDENCE

BY

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ADVERTISEMENT.

The following pages partake more of the nature of an abstract than an analysis, though I have retained the latter title in conformity with my original plan. They form the substance of the notes I found it necessary to take down when preparing for the University Law Examination, and the great demand I have had for them among those who qualify themselves for the Uncovenanted Civil Service special tests, has encouraged me to offer them to the Public in the present shape. To prevent an undue use of the book, I deem it but right to state that the book is intended simply as a help to Candidates in remembering the chief points in the law of evidence, but that it does not aim at being a complete treatise by itself. To understand the principles thoroughly, the invaluable Treatise of the Honorable Mr. Norton must be well studied, and then the present work used. Without making Mr. Norton responsible for the errors and defects the work may contain, I may add that it is published with his permission.

T. CHELLAPPA.

New Town, Cuddalore,
27th July 1865.

SYNOPSIS.

AN

ANALYSIS OF

NORTON'S LAW OF EVIDENCE.

1. *Law* is either Divine or Human.

2. *Human Law* may be divided into International and National.

3. *International Law* is the law which nations have agreed to be bound by in their intercourse among each other. Such are the rights of War and Peace.

4, 5 & 6. *National* or *Municipal Law* of England is the rule of civil conduct prescribed by the Supreme power in the State, and is either written or unwritten.

7. *Written* or *Statute Law* consists of rules which have been reduced to writing by the Legislature.

8. *The Unwritten Law* consists of the Common Law and Equity.

9. *The Common Law* is to be found in the printed Records of the various decisions of the Courts under the name of Reports, and hence it may now be said to be written. *Equity* is the correction of that wherein the law by reason of its universality is deficient.

10. *Municipal Law* may be divided into *Substantive* and *Adjective.*

11 & 13. *Substantive Law* is either *declaratory* or *mandatory,* and includes all rules prescribing lines of civil conduct. *Adjective* is either preventive or remedial, the former by force or fear, the latter by restoration or compensation.

Adjective Law includes the laws of *Procedure*, *Pleadings* and *Evidence.*

14. The Law of *Procedure* is that whereby the conduct of trials from the summons of the party to final execution of judgment is regulated.

15. The object of *Pleadings* is to instruct the Judge as to the points in dispute which he is called upon to try, and to reduce the dispute to its narrowest limits.

16 & 19. *Evidence* is that which the parties produce to the Judge, in order to enable him to form his opinion on the truth of the facts stated in the Pleadings or such of them as remain to be tried under the various issues; distinguished from *arguments* offered to show how such evidence bears upon the various points to be established.

20. If evidence amounts to conviction it is called *proof*.

22. Evidence is considered under three heads:

I. As to Principles.
II. As to Kind.
III. As to the Instruments of Proof.

23. The English Law of Evidence is in general the guide in the Mofussil Courts.

24. The force of evidence rests upon the proved experience, that as a general rule men speak truth rather than falsehood.

PART I.—EVIDENCE AS TO PRINCIPLES.

CHAPTER I.

PRINCIPLES CONSIDERED GENERALLY.

25. The principles of legal evidence are the same as those which an educated man would act upon on enquiring into the truth of any investigation in every-day life.

26. The only causes for the exclusion of evidence in legal enquiries are vexation, delay and expense.

27 & 28. In the absence of these obstacles, everything which can throw light upon the subject under investigation must be admitted, which was not the case until comparatively recently; thus parties disputant, those pecuniarily interested, those convicted of infamous crimes, &c., were not heard. In

these cases the objection is against the credibility and not against their admissibility.

30. Similar capricious exclusions of evidence are to be met with in the law of other nations. Thus the Hindus would not listen to lepers and outcasts. The Mahomedans exclude females. According to the Canon Law, madmen, idiots, infants, slaves, perjurers, infamous, excommunicated persons, parties accused of crime though not condemned, were irreceivable as witnesses.

But a person deficient in religious belief, or of defective understanding, ought reasonably to be excluded.

35 & 36. Evidence is either *Direct* or *Indirect.* Direct evidence is either *Mediate* or *Immediate.*

33. The evidence of witnesses who speak from the experience of their bodily senses is immediate.

34. The evidence of those who give their evidence derivatively is mediate.

38. The law operates upon evidence :—

I. By excluding it altogether or admitting it subject to certain artificial tests.

II. By annexing certain artificial effects to it when it has been admitted.

39. The fundamental principle upon which the law regulates evidence is, that the best evidence which the case admits of, shall in every instance be produced.

40. The excluding tests are :

(1) Oath. (2) Cross-examination.

42. Bentham assigns the following guarantees for a witness speaking the truth :—

I. Natural—*i. e.*, that it is more easy to tell the truth than falsehood. The former is often the work of memory, the latter requires invention.

II. Moral guarantee, which rests on the distaste of the generality of men to earn the infamy which attaches in society to the character of an utterer of falsehood.

III. Religious Guarantee :—The fear of incurring God's displeasure.

IV. Political Guarantee :—The fear of temporal punishment.

43 & 44. In determining on the veracity of a witness the Judge has two matters to regard :—1st, his ability; 2nd, his willingness.

Cross-examination is a powerful detective in the former; and cross-examination and oath are powerful in the latter.

CHAPTER III.—(1) OATH.

45. The oath must be judicial.

46. Formerly, the party taking the oath must have had a belief in the existence of a God and in a future state of rewards and punishments.

47. Hence idiots, lunatics, children, uneducated persons and Atheists were excluded.

48. An idiot is a person born without rationality; a lunatic is one originally born with rationality but subsequently becoming insane.

49. In the case of children and adults incapable through defective education, of understanding the nature of an oath or affirmation, the practice is to put off the trial until the party has had the necessary instructions imparted to him. Such parties may be admitted to give evidence on simple affirmation.—*Brazier's Case.*

50. The Judge should ascertain by personal examination, the mental qualification of the witness.

52. The policy of modern days has been to substitute solemn affirmation for oath.

53. For a bad man will avoid the oath by feigning a scruple he does not feel; a good man does not need it as a sanction for the truth of his declaration.

54. Penalties for perjury will attach to a wilfully false statement made upon affirmation solemn or simple.

55. Persons who had religious scruples and persons *in extremes*, were always exempted from taking oath.

56. The admissibility of the latter depends on the maxim, "No one about to die is presumed to lie."

57 & 58. A dying declaration is admissible although the party entertained a hope of recovery at the time of making it; and although the party against whom it is made had no opportunity of cross-examining.

59. The oath is to be administered in the form most binding upon the conscience of the witness.—*Omychund* v. *Barker*.

CHAPTER IV.—(2) CROSS-EXAMINATION.

60. Cross-examination is directed both to the ability and willingness of a witness to speak the truth.

61. By this means, the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclinations and prejudices, means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means in the first instance, and his capacity for retaining and describing them are fully investigated and submitted to the consideration of the jury.

62. It is sufficient if the party to be affected by the cross-examination was present and had the opportunity of cross-examining though he may not have actually done so.

63. Hence this test excludes all *res inter alios acta*. There is however an exception in favor of matters in which the public take an interest, since final adjudication is necessary in such cases.

64. The result of oath and cross-examination is to exclude *Hearsay* or mediate evidence.

66. *Hearsay evidence* is confined to that kind of evidence whether spoken or written, which does not derive its credibility solely from the credit due to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information.

CHAPTER V.—(3) OTHER CAUSES OF EXCLUSION.

The following classes of evidence are excluded :

67. (1) Secondary evidence while primary is procurable. A copy of a deed is not receivable until the original has been accounted for.

(2) Collateral matter, from regard to convenience; for the public time requires some limit to be put to Judicial investigation. Thus,—

a. A custom in one village is no evidence of a similar custom in the one adjoining.

b. The fact that the defendant represented to several tradesmen as an unmarried woman is not evidence to prove that she so represented herself to the plaintiff.

c. On an indictment for stealing the property of A, and also receiving the stolen property, knowing it to have been stolen, evidence of possession by the prisoner of other property stolen from other persons, is not admissible to prove either the stealing or the receiving. It may be material to enquire into the offender's previous character after conviction.

d. So evidence as to particular facts in the past history of a witness is not receivable although general evidence is, for such reception would lead to complicated issues and long enquiries without notice, and secondly, a man cannot be expected to defend all the acts of his life.

A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and

upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.

69. (3) Certain classes of evidence on the ground of *Public Policy*, from a consideration of the convenience of the public, the peace and safety of society, &c. Such classes are:—

a. State secrets.

b. Privileged communication.

c. Testimony of husband and wife for or against each other.

d. The necessity of replying to criminating questions.

71. The law in these cases interferes to protect not to shut out.

71. *a.* The testimony of a husband or wife against each other was not receivable in any case before the passing of Act II of 1855. But now it is receivable in Civil cases. In the Mofussil it appears to be receivable also in Criminal cases.

71. *b.* In cases of treason, husband and wife are good witnesses against each other. Also in cases of personal ill-treatment, murder, forcible abduction and marriage.

74. Children under 7 years of age and persons of unsound mind are incompetent to testify.

CHAPTER VI.

OPERATION OF LAW IN ANNEXING CERTAIN ARTIFICIAL TESTS.

76 & 77. *Written Instruments* and *facts*, when satisfactorily proved and declared admissible, have certain artificial effects attached to them.

79. Written Instruments are either public or private.

80. The law attaches (1) to some of the former class universally an artificial effect; (2) to others only under special circumstances.

81. (1) Of the first class are Acts of Parliament and the Legislature, Acts of State, as Proclamations, Public Registers of Births, Marriages, &c.

82. (2) Of the other class are Judgments, Verdicts, &c. They are of such public notoriety that the ordinary tests of legal truth to establish their veracity should not be required.

83. But to hold such Public Written Instruments binding upon the whole world is against the principle, that *res inter alios acta* shall not be evidence against third parties.

84. Judgments *in rem* declaring personal status or condition, are conclusive upon the whole world ; as Judgments of Bastardy, Adultery, Adoption. *Vasureddy's Case.*

87. In other cases the Law attaches to Judgments artificial effects only under special circumstances, viz., where the Judgment which is sought to produce as evidence has been pronounced between the same parties or their privies.

88 & 89. (2) The law has in certain cases prescribed certain conventional forms for the purpose of manifesting and perpetuating the acts and transactions of private individuals, and it annexes an artificial effect to such instruments, such as wills, agreements, coming under the operation of the Statute of Frauds.

90. A Will by a British Subject, in order to be valid,

a. must be signed by the testator.

b. must be signed by the witnesses.

c. both of whom must sign in the presence of the testator and of each other.

91. The law has also annexed certain artificial effects to private Written Instruments, even where it has prescribed no form ; thus a bond under seal is conclusive proof of the consideration it recites.

92. Thus also, a Bill of Exchange implies *primâ facie*, that consideration has been given for it. But when a deed is impeached for fraud, parol evidence of a consideration different from that appearing on the deed may be given in support of the deed.

93. In all other cases of contracts, the consideration must be proved.

95. So a party is, in many cases, estopped from denying his own admissions and representations.

96 & 97. The law annexes an artificial effect to facts by raising upon facts certain artificial presumptions, by drawing from them certain arbitrary inferences as contra-distinguished from those which a Judge or a Jury would naturally draw were the law silent on that point. These are legal presumptions as distinguished from artificial ones.

98. *Legal presumptions* are of two kinds : *rebuttable* and *irrebuttable.*

99. Recapitulation. 1. Generally speaking, there is no difference in judicial and ordinary matters. (25) 2. The law only varies the ordinary course from causes originating in vexation, delay, or expense. (26) 3. It operates by way of exclusion or annexation of particular effects. (38) 4. Its principal excluding tests are oath and cross-examination. (40) 5. But on grounds of public policy it excludes also certain other cases of testimony, as secrets of State—confidential communications, &c. 6. It annexes effects to instruments and facts ; to the former according as they are of a public or a private character : to the latter by way of drawing from them certain inferences or presumptions.

PART II.—THE KINDS OF EVIDENCE.

CHAPTER VII.

DIRECT AND INDIRECT EVIDENCE.

101. Different divisions of evidence according to different principles :—Indirect and Direct; Original and Secondary; Primary and Derivative; Natural and Artificial; Mediate and Immediate; Collateral and Circumstantial; Conclusive and Presumptive; Real and Personal.

102. Evidence delivered by a person is *personal,* that derived from a thing is *real* : both are of a direct nature.

103. The point to be proved is *factum probandum*. The fact which proves is *factum probans*.

104. *Facta probantia* are either direct or indirect. The force of direct evidence rests entirely upon the credit attached to the *factum probans*.

105. The force of indirect testimony rests not only on the credit attached to the *factum probans*, but also to the result which by a process of reasoning it indirectly establishes on the mind of the Judge.

106. The first division of evidence is into *direct* and *indirect*.

109. Direct is *mediate* or *immediate* :—the witness who on oath and subject to cross-examination reports the evidence of his own senses, gives immediate evidence. One permitted to report what some third person has told him, gives mediate evidence or hearsay evidence.

CHAPTER VIII.

HEARSAY EVIDENCE AS ORIGINAL EVIDENCE.

112 Hearsay is in some cases original, as where it could not have been delivered subject to the ordinary tests ; as in cases,—

1. Of letters where the subject of enquiry is, whether A wrote or received a particular letter.—*Cotton* v. *James*.

114. 2. Of public opinion or reputation—*Gurr.* v. *Rattan.*

115-116. 3. Where the question is the impression produced upon an aggregate of minds.—*Du Bost* v. *Beresford.*

117. 4. Where it is material to enquire into the demeanor, mental feelings, &c. Hence the expressions used by the individual are in their nature original evidence.

118. 5. Where the expressions of a person are material to ascertain the state of his bodily health, pain, &c.

119. 6. Where it is important to enquire whether any complaint has been made, as in rape cases.

120. 7. Where declarations become important, as forming part of the *res gestæ;* as in the case of conspirators, whose sayings, &c., are admissible against others accused of participating in the conspiracy.

122. 8. To explain the nature of their act.—*Hardy's Case.*

123. Hearsay statements will not be receivable if not actually part of the *res gestæ.*

CHAPTER IX.

HEARSAY EVIDENCE GENERALLY.

125. It is never receivable if better evidence is procurable and kept back. But there are certain subjects which cannot possibly from their very nature admit of the production of immediate evidence, because they are not the subject of the senses at all; such as relationship, character, custom, prescription, &c.

127. They may be arranged under the following heads:

1. Matters of public and general interest.
2. Questions of ancient possessions.
3. Matters of pedigree.
4. Cases of dying declarations.
5. Cases of declarations made against the interest of the person making them.
6. Cases of entries made in the ordinary course of business.
7. Admissions by a party to the suit, his partner or agent.
8. Confessions.

128. Except in the abovementioned cases, hearsay evidence is not generally receivable.

CHAPTER X.

1. HEARSAY IN MATTERS OF PUBLIC AND GENERAL INTEREST.

130. The admissibility of hearsay evidence in this class of cases rests mainly on the following grounds:—

That the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and

general a character that direct proof of their existence can seldom be obtained ; that in matters in which the community are interested all persons must be deemed conversant ; that as common rights are naturally talked of in public, and as the nature of such rights excludes the probability of individual bias, what is dropped in conversation may be presumed to be true, &c.

131. *Public* is used of that which is common to all as a highway ; *General*, of that which concerns many indeed, but not of the entire body of the public, as a right of common.

132. Phillipps treats the subject in the following order :—

(1) Examples of matters of public and general interest.
(2) The form under which hearsay is usually presented.
(3) The qualifications under which it is receivable.

133. (1) EXAMPLES :—A boundary between two villages; the limits of a village or a town ; a right to collect tolls ; a right to trade to the exclusion of others ; a right to pasturage of waste lands ; liability to repair roads or plant trees ; right to water-courses ; rights of common and the like.

134. Rem. 1. It is not receivable to prove a private prescriptive right. *Reg. v. Inhabitants of Bedfordshire.*

135. Rem. 2. Such evidence is as much receivable *against* as in favor of a public right.

136. (2) *Forms.* Old documents, leases, maps, copper grants or Sasanums of Pagodas, verdicts and judgments, wherein the same right was in dispute though not between the same parties.

137. Rem. But such Judgment must have been delivered by a Court of competent authority, and it must have been final.

138. (3) QUALIFICATIONS. *a.* The rights to be proved ought to be of a public and general nature—Rem. 1. In a public matter reputation from any one is receivable, but in one of a general nature evidence of such only is receivable, who from their situation have a peculiar knowledge of the fact.

139. Rem. 2. Acts of enjoyment of the rights need not be proved—these affecting their value but not their admissibility.

140. *b.* The declarations must have been made (*ante litem motam*) before the dispute arose.

142. Rem. 1. Declarations will not be rejected in consequence of their having been made with the express view of preventing disputes.

Rem. 2. They are admissible if no dispute has arisen, though made in direct support of the title of the declarant.

Rem. 3. The mere fact of the declarant having believed that he stood in the same situation as the claimant, will not render his statement inadmissible.

Rem. 4. Declarations made after the dispute arose will be receivable, if the party offering them in evidence can show by any proof satisfactory to the Judge, that the declarant was in all probability ignorant of the existence of the controversy.

143. *c.* Evidence must be confined to general facts.

CHAPTER XI.

2. ANCIENT POSSESSIONS.

144. This refers to possessions of individuals and not to matters of general interest. A document thirty years old proves itself; *a fortiori* must this apply to ancient documents.

145. That ancient documents might be receivable it must be shewn,

(1) They form part of the transactions and are not a mere narrative of facts, *i. e.*, they must form links of the chain of evidence.

(2) That modern ownership has been exercised by virtue of those ancient documents;

147. As for instance by shewing that repairs have been made to the house to which title deed refers payment of rent on the land and the like :—

(3) And that the documents have come from the proper custody.

CHAPTER XII.

3. PEDIGREE.

151. Pedigree may be considered under the following heads :—

(1) What are matters of Pedigree.

(2) The different forms in which hearsay presents itself in questions of Pedigree.

(3) The qualifications under which evidence is receivable in questions of Pedigree.

153. (1) *Matters.* Such matters as relate to general evidence of descent or relationship.

Explanation: Descent means lineal descent. *Relationship* is used of collateral relations and sometimes of relationship by marriage, which is more accurately termed *affinity.*

154. Evidence of particular facts, such as birth, death, marriage, relationship, &c., is necessarily receivable.

154-156. Hearsay evidence is receivable as to time, but not as to place. The reason of the distinction is said to be that the place of birth, &c., is not a question of pedigree. But parties are as likely to remember accurately the place as the time of birth, and therefore the distinction can hardly be sustained on rational grounds. *Shields* v. *Boucher.*

157 (2) *Forms.* Oral evidence, entries in family Bibles, inscriptions on tomb-stones and coffin plates, genealogical trees hung up in family mansions, engravings on mourning rings, &c.

158. Peculiar weight is attached to entries in family Bibles.

159. Entries in Almanacs, Prayer books, Roman Catholic missals ; family documents, family correspondence ; armorial bearings, &c., have also been received.

161. The credit due to monumental inscriptions must necessarily depend upon circumstances, whether they are contemporaneous with the events to which they relate, and whether they are set up in the view or with the knowledge of surviving relatives.

162. (3) *Qualifications. a.* It is necessary that the original author of the statement should have had the means of knowledge.

163. Rem. Evidence of persons who, though not related, were intimately acquainted with the family, shall be admissible in evidence after the death of the declarant in the same manner as those of the deceased members of the family.

164. *b.* The declaration must have been made before the dispute arose. If the dispute has arisen, it is no longer a natural effusion of the mind. It is subject to a strong suspicion that the party was making evidence for himself or for those in whom he takes an interest.

CHAPTER XIII.

4. DYING DECLARATIONS.

165. Where a man is dying, the awful position in which he is placed is hold by the law a sufficient guarantee for his veracity; and therefore oath and cross-examination are dispensed with under such circumstances.

166 & 167. Dying declarations are receivable although not made in the presence of the accused, and although, believing to be in danger of impending death, the deceased entertained hopes of recovery. at the time of making them.

168. It is seldom that a dying declaration is made wilfully false, but there are many circumstances in the situation of the wounded man which may introduce elements of fallaciousness into his statement, as the weakness of his memory, the suddenness of the attack, the darkness, disguise, &c.

169. The following observations may be borne in mind :

(1) That dying declarations are receivable only on a charge of homicide, and there only to prove the cause and circumstances of death.

(2) It matters not in what form the dying declaration is taken.

(3) The interval between the time of the declaration and death is immaterial

(4) The statement of a dying man in favor of a person is as receivable as one against him.

(5) Dying declarations are as open to be contradicted by proof as any other evidence.

CHAPTER XIV.

5. DECLARATIONS AGAINST THE INTEREST OF THE PERSON MAKING THEM.

170. Declarations against their own interests of persons, who are not parties but competent witnesses for or against the respective parties to the suit, are receivable.

171. For persons are very careful not to make such statements unless they are true.

172. The form in which such declarations are ordinarily offered is that of written entries; but evidence of oral statements of this quality appears to be also receivable, but it is less satisfactory.

174. Until lately such evidence was not receivable, unless the person making the entry was dead; but now by Act II of 1855 it is also receivable, if he is incapable of giving evidence by reason of his subsequent loss of understanding, or is at the time of trial *boná fide* and permanently beyond the reach of the process of the Court, or cannot after diligent search be found.

175. The author of the statement or entry must have had the means of knowing that his statement was true.

176. The interest must be of a pecuniary or proprietary character.

177. The ordinary cases in which evidence of this sort is tendered are those in which persons have charged themselves with the receipt of money, as the entries of stewards, tax-gatherers, bailiffs, &c.

178. Books of this character are entitled to more consideration than purely private books, inasmuch as they are usually subject to inspection by the employer of the maker of the entry.

179. Such entries are only receivable when they are material to the merits of the case.

180. They are not receivable when better evidence is to be had to prove the same fact, as when the maker of the entry is himself forthcoming.

181. An entry charging the maker with the receipt of money is receivable, although on the other side, he has made an entry discharging himself.

182. Entries against interest need not be contemporaneous.

183-85. Such entries are receivable for the purpose of proving the circumstances of which they speak as well as the single dry fact of payment.

186. Such entries are not the less receivable, because the same fact may be proved by evidence of another description: for a fact may be proved by independent testimony, notwithstanding there may be two ways of proving it. Thus the mere fact that there has been a receipt for money will not preclude the proof of payment by oral witnesses who saw the payment.

187. The entries must be proved to be in the hand-writing of the party purporting to have made them, before they can be received. Where the entry is thirty years old, it proves itself.

188. Cases may be conceived in which a party may have made fictitious entries charging himself apparently against his own interest, as where a party charges himself with the

receipt of interest by way of endorsement on a stale bond, to take it out of the Statute of Limitations. *Searle* v. *Lord Barington.*

CHAPTER XV.

6. ENTRIES MADE IN THE COURSE OF BUSINESS.

192. Such entries are received on the ground that they are usually free from suspicion of carelessness or fraud.

193. The entry should be contemporaneous or nearly so with the fact it chronicles.

194. By Act II of 1855, this description of evidence is now receivable in the same cases as entries against interest, even when the maker is not dead. Also for the purpose of identifying any "Bank Note or other securities for the payment of money or other property, and the payer or receiver of them," though the maker of the entry is capable of being produced as a witness.

195. It is necessary that the party making the entry should have had a personal knowledge of the facts to which it relates.

198. Such entries are not receivable to prove any collateral fact.

200. In the practice of the Mofussil Courts, the entries made by a party himself in his own books have been held sufficient to prove his case. This is against the English Law, though in accordance with the Roman, French and Scotch Laws. The objection should go against the credibility rather than the reception of the evidence.

CHAPTER XVI.

7.—ADMISSIONS MADE BY A PARTY TO A SUIT, HIS PARTNER OR AGENT.

202. If the presumption that a man will not make an entry or declaration contrary to his own interest is thought sufficient guarantee for the veracity of the entry in the case of third persons, who have no interest in the subject matter of the suit, the stronger is the presumption when the declaration proceeds from one of the parties to the suit himself.

203-4. The following Rules should be observed :—

(1) The whole of an admission should be submitted, but the Judge is not bound to place an equal degree of reliance on all points so offered.

205. (2) If a statement refers to another statement, the party against whom the statement is offered, has a right to insist that the other should be put in also.

206-8. (3) But a rambling statement on collateral matters is inadmissible, *i. e.*, a party can only have read all other matters which explain, qualify, or bear upon the statement given in evidence.

209-14. (4) A party's verbal admission is as receivable as his written statement; and it is not necessary that the non-production of the written statement should be accounted for before the reception of the verbal admission. *Slatterie v. Pooley.*

215-7. (5) Where a party has made a statement or admission on the faith of which another has acted, so as to change his own situation, such admission or statement is conclusive against the party making it.

218-25. (6) The admission of a person identified in interest with the party to the record, a partner, or an agent, is receivable against such party; but that of a guardian is not.

221. Rem. 1. Privies are of three classes.—Privies in blood, as heir, ancestor, &c. Privies in estate as donor, donee; lessor, lessee; executors, testators, adminstiators and their intestates. Privies in law—those on whom the law casts a privity as where land escheats in failure of heirs.

223. Rem. Before the declarations of a partner or agent can be received, the partnership or agency must be established by independent evidence, and the declaration must be made within the scope of the agency or partnership.

226. (7) The admission of a wife will bind the husband only where she had authority from him to make them.

227. (8) The admission of Attorneys on the record and their clients in all matters relating to the progress and trial of the cause. But such admissions should be distinct and formal.

228. (9) Admissions by Counsel stand on much the same footing, but the latitude of Counsel's statement often tends to inaccuracy, and it is not safe to look to Counsel's "openings" as to the facts which he proves. But if the client is present at Court and hears his Counsel's statements without any objection, he will be bound by it.

229. (10) A party is generally bound by admissions in his pleadings.

230-1. (11) As well as by his own conduct during the progress of the cause—as suppression of documents, silence, acquiescence, &c.

233. Rem. 1. All verbal admissions are to be received with caution; for the party may not have clearly expressed himself, the witness may have misunderstood him, or by unintentionally altering a few of the expressions really used, give an effect to the statement completely at variance with what the party actually said.

234. Rem. 2. Admissions made under constraint or by mistake or obtained by mis-representation or fraud are not receivable.

235 Rem. 3. Nor those made during confidential overtures for pacification, arbitration or settlement of disputes.

CHAPTER XVII.

8.—CONFESSIONS.

237. The term confesssion is applied to an admission made by a person against his own interest on a criminal charge. As the consequences are more serious, so is the reception of confessions in criminal cases still more stringently watched than that of admissions in civil suits.

238. Where the origin of the confession is untainted with suspicion, and it can be safely relied on, it is most satisfactory. For if the consideration that even in civil cases the improbability of a man's speaking against his own interest, affords a sufficient guarantee for his veracity, the stronger is the presumption in criminal cases, where even his life may be at stake.

240. Hence the bare confession of a prisoner is sufficient to warrant his conviction, even though there be no corroborative evidence of his having committed the crime with which he stands accused.

242. But in many cases a voluntary confession might have been made through motives of fear, hope, vanity or under the influence of insanity or hallucination.

243. Hence no confession is receivable if its source be not free from the remotest taint of suspicion. It must not have been wrung out by threats or promises.

244-7. In this respect there is a great difference between the English and Continental Courts.

250. It is sometimes quite impossible to divine the motives of human actions. *Harrison's Case.*

251. All confessions must be the result of mistake or not of mistake ; and those of mistake either as to fact or as to law.

255. *Mistake of law* takes place when a man is conscious of *moral* guilt, but does not know that *legally* he is not guilty.

256. In false confessions not of mistake, the wide field of motive must be searched. They are :—

257. (1) To escape vexation. This includes all those confessions which are extorted from a prisoner by bodily or mental torture. The case of the *Boorns.*

259. (2) To stifle enquiry, as when one accused of a comparatively trifling crime, hoping by a confession to throw off suspicion as to some crime of greater magnitude, which he has really committed.

260. (3) Weariness of life. The case of one who confessed himself guilty of murder which he had never committed in order to prevent his again falling under the dominion of a cruel master.

261. (4) That originating in the relation of the sexes.

262. (5) Vanity—*i. e.*, forcibly sinking one's self in the good opinion of a part of mankind under the notion of raising himself in that of another.

263. (6) To benefit others; the case of the two women who falsely charged themselves with a capital crime, in order to obtain for the children of one of them, the provisions secured to orphans by the law of their country.

264. (7) To injure others, as where persons accuse their enemies as participators in the crime.

265. (8) That arising from hallucination, in which there is not any mistaken apprehension of facts, correctly speaking,

but the belief in a fact which has no existence—such as extraordinary confessions of witchcraft.

269. There are certain other sources of error to which more or less in common with all oral testimony, confessions are liable; they are:—

270. (1) *Mendacity*, as where a witness reports a confession never in fact made at all; or where, though there is not a total fabrication, there is an intentional mis-representation of what has actually been confessed.

271. (2) *Mis-reporting* :—which arises where there is no wilfully mendacious false coloring, but what has really been said has been mistaken.

272. (3) *Incompleteness* :—which occurs when the witness has correctly enough apprehended what the party confessing really said, but through defective memory, or other cause, fails to report the whole of it or accurately to report it.

273. Confessions may be made by a party by his acts as completely as by his words, as by his silence when accused of the crime, which is *non-responsion*; by *evasive responsion*; or *false responsion.*

274. *Silence* implies consent; but it may be the result of prudent caution entirely compatible with innocence, or of fear, or confusion.

275. The inference which arises from *evasive responsion* is stronger; that which arises from *false responsion* is stronger still, as where a party found in possession of stolen property gives an untrue account of the way in which it came to his possession

277. According to English law, a confession though uncorroborated, is sufficient to warrant a conviction; but it is not so according to American, Scotch, or Mofussil Law.

280-1. When confessions are rejected on the score of their having been made under threats or promises, they must have had reference to the prisoner's chances of escape from the consequences of the charge, or to some temporal advantage.

282. Although a threat or promise has been used, a subsequent confession will not be excluded if it can be provêd that at the time of making the confession, the influence of the promise or threat had ceased.

283. When the inducement has proceeded from a third party having no authority to hold out hope, the confession is receivable.

284. Persons having authority are Magistrates, Sheriffs, Constables, Masters and Mistresses.

285. A confession obtained by artifice or deception is receivable.

286. A party is bound to answer criminating questions, but the answer elicited shall not be used against him.

287. *Facts* discovered in consequence of confessions improperly elicited are admissible.

288. A confession is only evidence against the party making it; not against those who are charged in common with him.

289. The whole confession must be taken together as in the case of admissions.

290: When a confession has been reduced to writing, the writing must be proved. To introduce it as evidence, inducement to confess must be negatived and then read.

CHAPTER XVIII.

CIRCUMSTANTIAL EVIDENCE.

293. Where the connection between facts is so constant and uniform that from the existence of the one that of the other may be immediately inferred either with certainty, or

with greater or less degree of probability, the inference is properly termed a *presumption*, in contra-distinction to a conclusion derived from circumstances by the united aid of experience and reason.

294. The necessity for resorting to circumstantial evidence is two-fold.

1st. In the absence of direct evidence.

2ndly. To check direct evidence.

295-7. Direct and indirect evidence have each its peculiar excellencies and defects.

Disadvantages of indirect evidence. (*a*) When proof is direct there are but two classes of error—mistake and mendacity; but in circumstantial evidence there is the fallaciousness of the inference in addition.

(*b*) Anxiety felt for the detection of crimes may lead witnesses to mistake or exaggerate facts and tribunals to draw rash inferences.

Advantages: (*a*)—It is free from suspicion, on account of the exceeding difficulty of simulating a number of independent circumstances, naturally connected and tending to the same conclusion.

(*b*) The greater the number of witnesses the greater is the difficulty to produce a successful concert.

(*c*) By including a portion of circumstantial evidence, the aggregate mass on either side, is, if mendacious, the more exposed to be disproved.

Rem. 1. Lest too much reliance should be placed on this, it is important to observe that circumstantial evidence does not always contain either numerous circumstances or circumstances attested by numerous witnesses.

Rem. 2. The more trifling any circumstance is in itself, the greater is the probability of its being inaccurately observed and erroneously remembered.

Rem. 3. But after every deduction made, it is impossible to deny that a conclusion deduced from a process of well conducted reasoning on evidence purely presumptive may be quite as convincing, and in some cases far more convincing, than one arising from direct testimony.

298. *Rules regarding the reception of circumstantial evidence*:—Circumstantial evidence shall never be resorted to, when direct evidence of the same fact is procurable and kept back.

Proof of the circumstances themselves must be direct; that is, the circumstances cannot be proved by hearsay. Circumstantial evidence in order to amount to proof, must exclude every hypothesis except that of the guilt or the liability of the accused.

300-2. Just as in direct evidence, the declarations and acts of strangers are excluded.

304. But declarations accompanying acts are not excluded, whenever the evidence of the act itself is admissible, for such declarations either constitute the very fact which is the subject of enquiry or elucidate facts with which they are connected having been made without premeditation or artifice and without a view to the consequences.

305. Nor are real or natural facts connected with the main transactions excluded.

PART III.

CHAPTER XIX.

THE INSTRUMENTS OF EVIDENCE.

308. Embracing,—

I. The principles which in practice regulate the method for placing the instruments of evidence before the Court.

II. The mode in which these instruments are used for the purposes of proof.

1.—THE PRACTICE REGULATING THE INSTRUMENTS OF EVIDENCE.

309. Instruments are either *oral* or *written*, the former are *witnesses*, the latter *documents*.

1.—ORAL EVIDENCE.

311. Oral evidence is considered under these heads:

(1) The mode of procuring the attendance of witnesses.

(2) How the law provides for enforcing the production of a document in the possession of a witness.

(3) What protection the law affords a witness in the discharge of his duty.

(4) What preliminary objections can be raised to the examination of a witness

(5) What rules the law prescribes for the examination of a witness.

(6) How the testimony of a witness may be rebutted or confirmed.

CHAPTER XX.

1.—THE MODE OF PROCURING THE ATTENDANCE OF WITNESSES.

312-36. See the Civil and Criminal Procedure Codes.

CHAPTER XXI.

2.—THE PRODUCTION OF DOCUMENTS IN THE POSSESSION OF PARTY OR WITNESS.

338-9. Objections to the production of documents must be determined by the Court.

340. *a.* A witness not being a party is not bound to produce his own title deeds unless he shall have agreed to do so in writing.

341. *b.* A party should not be compelled to give evidence and produce documents irrelevant to the suit, or his confidential communications with his professional adviser unless he offer himself as a witness.

342. *c.* A party may be compelled to give evidence and produce documents in the same way as if he was not a party.

343. *d.* A pleader is not to divulge his client's secrets or produce his documents;

349. But the client may waive the privilege. Such communications must have been made in a professional capacity.

344-5. *e.* So interpreters and all organs of communication.

346. *f.* But this rule does not extend to medical advisers.

347. *g.* Nor to clergymen, though it is desirable that it should be extended.

348. *h.* An ordinary agent must disclose his communications with his principal.

348. *a.* *i.* Secret communications respecting fraudulent transactions must be disclosed.

351-4. *j.* Judges, arbitrators and jurors are not compellable to testify as to matters in which they have been judicially engaged.

355. *k.* A similar objection lies against compelling the production of State secrets.

356. Hence letters addressed to Government officially are not producible without the consent of the Government.

356. *a.* Rem. 1. The object of inspecting an adversary's document must be that of supporting the applicant's own case not of seeing how the adversary's case stands or what answer can be made to it.

357. Rem. 2. The neglect of a witness to produce a document will not be a sufficient ground for admitting secondary evidence of its contents; but where a document has been transferred to the adverse party with the fraudulent intention of preventing its production, secondary evidence of its contents is admissible.

358. Notice or summons to produce a document must be given a reasonable time before the trial.

359. The notice or summons should specify the document required with as much particularity as lies in the party's power.

CHAPTER XXII.

3.—THE PROTECTION OF WITNESSES.

360. Witnesses are protected from arrest on their way to the Court, at Court, and on their way back.

Rem. When it appears there has been no improper loitering or deviation from the way, Courts will not enquire whether the witness or other privileged party went as quickly as possible and by the nearest route.

362. This protection extends only to civil suits.

363. Bail may arrest the party for whom he is security at any time; for this is not taking, but re-taking.

CHAPTER XXIII.

4.—PRELIMINARY OBJECTIONS TO THE EXAMINATION OF A WITNESS.

364. See Section 30. The tendency of modern legislature is to admit all evidence possible.

365. The proper time for making the objection is before the witness is sworn; but at any time during the examination.

at which the incompetency becomes apparent, the objection will prevail, and the evidence already taken will be struck out.

366. By the Scotch law, the objection must be taken before the witness is sworn.

366. *a.* If Counsel does not object to the testimony of witnesses or the reception of documents, he will be bound by what appears on the judge's notes, though it might not be strictly legal evidence. Counsel must therefore be watchful and wary.

367. Any number of witnesses may be called to prove the same fact.

367. *a.* Care must be taken lest the practice should be abused.

CHAPTER XXIV.

5.—EXAMINATION OF WITNESSES.

371. The practice by which the examination of witnesses is regulated may be considered under three heads :—

a. Examination in chief.—The examination of the witnesses by the party tendering him.

b. Cross-examination.—The examination by the opposite party to search his credit and veracity.

c. Re-examination.—The examination by the party responding for the purpose of explaining anything which may have been elicited on cross-examination.

a.—Examination in chief.

372. (*a*) *Form of questions.* Leading questions are not to be asked.

373. Exp. Leading questions are questions to which the answer yes or no would be *conclusive.*

It is proper to lead a witness in all matters which are merely introductory, and the same question may be objectionable or unobjectionable according to circumstances.

374. Thus leading questions may be put in cases of mere identification, but not where the witness is suspected.

375 & 378. Nor where the particular terms of a conversation, admission or agreement are important.

376. Any question which suggests or prompts a particular answer is inadmissible.

377. A pleader may occasionally lead or rather cross-examine his own witness where the witness is hostile to him. The modern tendency of practice is to keep the examination in chief to its ordinary bounds and to take the demeanour, &c. of a witness into consideration when determining on his credibility and weight.

377. *a.* Whether a witness is to be considered hostile or not, is a point to be decided by the judge.

379. Where details are of such length that the memory requires assistance, the witness may be led.

380. Leading questions are forbidden in criminal trials.

382. (*b*) *Subject matter of questions.*

a. Every witness is examinable as to all facts within his own knowledge.

β. He is examinable as to inferences drawn by him from facts within his own knowledge; but he cannot be asked as to his inferences drawn from what he has simply heard from others.

383. Except in regard to belief or opinion in matters of science.—*McNaughten's Case.*

384. By Scotch law, a private writing, if tendered in evidence, must be proved either by

(α) The person who wrote it.

(β) Those who have seen him writing.

(γ) Those who knew his writing.

(δ) By engravers.

(ε) By comparison.

385. Comparison of hand-writing is not allowed in Mahomedan law.

386. It has now been legalized by Act II of 1855.

387. A man swearing falsely to belief may be indicted for perjury.

388. In France the evidence of skilled witnesses or experts is carried to a great length.

389. A witness skilled in foreign law may be asked as to his opinion of the law.

390. Great caution is necessary in receiving the evidence of professional witnesses.

391. γ. A witness may be examined as to hearsay in Pedigree, &c. (127-292)

392. A witness may be allowed to refresh his memory

α. When the document (written at or about the time of the event to which it relates) brings the facts immediately to recollection.

α. When the witness has no present recollection of the fact itself brought home to him by the perusal of the document, but he can state that he did truly commit the fact to writing.

γ. When he recollects nothing from the document, but feels satisfied that he would not have written it, unless it were true.

394. An instrument used for refreshing memory ought to be in the hand-writing of the person using it, and as nearly as

possible contemporaneous with the fact which it records; but these conditions are not indispensable.

b.—Cross-examination.

399. Any witness who has once been sworn may be cross-examined, though not examined in chief, unless he has been sworn by mistake.

400. Leading questions may be asked on cross-examination; but words must not be put into the mouth of a witness that he may echo them back, nor must the pleader assume as already proved any fact which has not been proved, or any statement as made which has not been made.

401. A witness may not be cross-examined as to collateral matters; for they are foreign to the issue.

402. But when a collateral matter has been examined into without objection being made, the evidence must be taken as it stands.

403-4. But the character of a witness is never irrelevant, since it is of the highest importance in enabling the judge to weigh the value of the testimony; hence a witness is bound to answer criminating questions.

405. When such a question is answered in the negative it is not open to contradiction.

406. And so a degrading question may be put.

408. And when answered in the negative the conviction may be proved.

409. A witness is bound to answer a question relevant to the matter in issue, although it may subject him to a civil suit.

411. A witness may be examined as to writings either:

(*a*) To establish the writing itself; or

(*b*) To test his memory.

412. In the first case the proper course is to show the document or some one or more lines of it, and then to ask him whether or not it is in his hand-writing.

413. In the second case, it is not so; for the very object of cross-examination may be defeated by allowing him to refresh his memory.

415. By Act II of 1855, a witness may be cross-examined as to previous statements made by him in writing without such writing being shown to him; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. But it shall always be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may therefore make such use of it for the purposes of the trial as he shall think fit.

416*a*. The opposite side was entitled to have the whole of the letter read where the witness, not a party to the cause, was asked to explain certain passages in a letter put into his hands.

417. A witness may not foist into his answer on cross-examination or any examination, statements not in answer to, nor explanatory of, his answers to questions put to him.

418. Great caution should be exercised in cross-examining. Unless there is some very good ground for believing that the witness can be broken down or convicted of falsehood, it is rarely good policy to submit him to a severe cross-examination.

419. False testimony is of two kinds: false *in toto* or false *in part*; of the two, the latter is the most common, and most difficult to cope with.

420. With reference to the former, the cross-examination should be directed to show the physical impossibility of what the witness has related in his examination in chief.—*Cases of*
122-3 *Compte de Morangiès : Susannah and the elders.*

424. When falsehood is of the latter kind, the improbability or moral impossibility ought to be shewn.

425. The maxim *false in one particular, false in all*, cannot be always accepted. The falsehood should be considered in weighing the testimony.

426. Where there is no reason to suspect the witness of falsehood, cross-examination should be directed to test his memory, observation and the like.

427-8. A witness who from self-sufficiency, or a desire to benefit the cause of the party whose witness he is, displays a loquacious propensity, should be encouraged to talk in order that he may fall into some contradiction, or let drop something that may be serviceable to the party interrogating. The course of cross-examination should in each cause be subordinate to the plan which the Advocate has formed in his mind for the conduct of it. Questions ought not, in general, be asked the answers to which, if unfavourable, will be conclusive against him ; and witnesses should never be alarmed, misled or bewildered.

c.—Re-examination.

429. Re-examination must be confined to the explanation of answers elicited on cross-examination : no new matter must be started.

430. Where it is desired to introduce new matter, the question should either be put by the Court or by the pleader with leave of the Court. The opposite side will be entitled to cross-examine on this new matter. The Court may put questions of its own motion.

(6) HOW THE TESTIMONY OF A WITNESS MAY BE REBUTTED OR CONFIRMED.

432. The testimony of a witness may be rebutted by

a. Cross-examination as to his memory or credit.

b. By the evidence of other witnesses who repeat the same fact differently.

c. By proof that he has himself at some previous time given a different account of the same transaction.

433. A party cannot discredit his own witness by general testimony as to his want of veracity.

435. But he may do so as to particular facts.

436. Where it is intended to rebut the testimony of a witness by contradicting anything that he has said or done in relation to the cause, it is necessary to put the very words, &c, into his mouth and ask him did he ever say so and so. Time and place must also be specified.

437. The testimony of a witness whose character has been impeached on cross-examination may be confirmed by general evidence of good character.

438. A witness may be confirmed by his own former statement.

439. A witness may be examined for both parties in chief; but the defendant's pleader should avoid the necessity.

CHAPTER XXV.

2.—WRITTEN INSTRUMENTS.

440. Instruments may be divided into

(1) Public.

(2) Quasi public and

(3) Private Instruments.

441. (1) Public Instruments are either

a. Not judicial, or

b. Judicial.

442 *a*. *Non-Judicial public Instruments.* This class consists of Acts of Parliament, Acts of the Legislature, Regulations, Proclamations, &c.

444. Courts are bound to take *judicial notice* of certain documents and facts, *i. e.*, they must acknowledge such facts or documents as true, without requiring any formal proof of them. They are proved by their simple production.

446-7. The effect of any recital in an Act in a matter of a public nature or in any Gazette or Newspaper, is that the truth of the matter referred to is *prima facie* established. Its truth may be rebutted.

448-50. Courts are empowered to refer to public books, maps, &c., on subjects of public history, foreign law, &c.

452. Foreign Colonial Acts of State and documents of a public character are proved by copies.

453. Before old maps and all instruments of a public as well as of a private character can be received in evidence, they should be shewn to have come out of the proper custody, *i. e.*, such custody as the document might reasonably be expected to come from, so as to prevent any suspicion of its having been tampered with or fabricated.

454. Registers of births, deaths, marriages, may be proved by examined copies of the original register. Certified copies are evidence of the registry.

455. *A certified copy* is one made by an official whose duty it is to furnish such copies to parties who have an interest in the subject matter, and a right to apply for them on payment or otherwise. *Examined copies* are those which any private individual makes from the original with which having himself compared them by examination, he is enabled to swear that they are true copies.

455 a. Where a copy offered as a certified copy is rejected as such under the Act, it may still be received as an examined copy, if it have been examined.

456. In an examined or sworn copy, there should be a change of hands in the examination, or the writer must himself have read the copy with the original.

CHAPTER XXVI.

b.—*Judicial Documents.*

457. According to their importance they may be classified in the following order :—

(a) Judgments, which include all interlocutory as well as final judgments, judicial orders, &c.

(b) Depositions, examinations, &c, taken during the course of the proceedings or trial of a cause, &c.

(c) Writs, summonses, processes, &c., incidental to the trial of a cause.

(a) *Judgments.*

458. These may be considered.

α. As to their mode of proof.

β. As to their effect.

γ. As to the mode in which they may be rebutted.

α. *As to their mode of proof.*

459. In the Mofussil Courts, the judgment to be in evidence must be on stamped paper, certified by the proper authority

A judgment of the Supreme Court or of the Insolvent Court, tendered in evidence before the Mofussil Courts, need not be on stamped paper.

463. The effect of certificates which correspond to probates or letters of administration, granted by Act XXVII of 1860, is to render the title of the holder conclusive as to the character of the representative, which cannot be disputed against the certificate.

464. Punchayet's awards are proved by the witnesses to the Muchilka, and by evidence of the signature of the award by the arbitrators. Such awards are binding though only signed by the majority.

β. *Effect of judgments.*

465. (α) A judgment delivered by a Court of Law upon a matter thoroughly investigated by it is evidence of the highest authority.

466. (β) The judgment of a Magistrate in a matter over which he had jurisdiction, bars enquiry into the truth of the facts upon which the judgment is based. The Magistrate may be liable, at the suit of the party before him, to damages for acts done in his *ministerial* capacity, but not for those done in his *judicial* capacity.

468. (γ) A judgment when used to conclude an opponent upon the facts determined by the judgment, is conclusive only when the parties are the same.

469. Judgments are of two kinds :—

(α) *In rem.*

(β) *Inter partes.*

470. A judgment *in rem* is an adjudication pronounced upon the *status* of some particular subject matter by a Court of competent authority. Such judgments are conclusive against all the world.

471-2. A condemnation of a ship as prize, forfeiture, divorce, probate, adoption, &c.—*Vasureddy's case.*

476-7. Judgments *inter partes* are not receivable in evidence against a stranger for want of mutuality; such stranger having never had the opportunity of stating his defence, of cross-examining or of appealing.

479. They are *admissible* against strangers although not *conclusive* in cases of a public nature, as customs, &c. (Section 133.)

480. But judgments *inter partes* are generally understood as applying to actions on private contracts or torts. Here they are not even admissible against strangers in accordance with the general law.

497. For the mere purpose of proving the existence of a judgment, the production of a record of either sort is conclusive upon all the world; but where it is sought to conclude some party upon the point adjudicated, the former is conclusive as between all persons whatever, the latter only against the parties to the suit.

482. Another good test for determining whether a judgment in a former suit is a bar in the second, is to consider whether the same evidence would sustain both.

483. The fact which the judgment is adduced to prove, must have been in issue in the former as well as in the latter action. It need not have been the sole fact in issue; nor does it matter that whether the parties filled the same relative positions as plaintiff and defendant in both actions.

484. It must be one which must have been necessarily enquired into.

485. The judgment, decree, or sentence must have been pronounced decidedly upon the precise point at issue, and is not evidence of any matter which came *collaterally* in ques-

tion, although it was within the jurisdiction of the Court, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment as having constituted one of the grounds of the judgment.

486. The judgment must have been given upon the merits. The case must not have gone off upon some technical or preliminary point, as a discontinuance of the action, non-suit, &c.

487. A judgment when it is intended to be used as a bar conclusive against the opponent, ought to be pleaded, in which case issue must be taken upon it, and if it is found in favor of the party producing it, the litigation is terminated, but if the party relying on the judgment has neglected to plead it, he may still produce it at the trial, as part of his evidence ; the Judge will attach to it whatever weight he thinks it entitled to.

488. A judgment in a criminal matter is not admissible in evidence in a civil action and *vice versa ;* for,

(α) Parties are not the same—the Crown being the prosecutor in criminal cases.

(β) A person may be liable in damages without having acted criminally.

(γ) It may not appear that the verdict was not procured by means of the testimony of the opposite party.

490. A judgment is not binding if the Court is interested in the subject in dispute. *No man can be Judge in his own cause.*

Foreign Judgments.

491. Judgments of a foreign tribunal are conclusive under the same circumstances as those of a domestic tribunal.

494. For facts can never be enquired into so well as on the spot where they arose, and laws never administered so satisfactorily as in the tribunals of the country governed by them ; and further some of the witnesses may be dead ; some of the vouchers may be lost or destroyed.

492. But a judgment is impeachable on the ground of a patent error.

493. It is incumbent on the party impeaching the judgment to prove the irregularity.

494 *a*. In *Down* v. *Lippman*, it was held that a Court called upon to enforce a *foreign judgment*, may examine into that judgment to see whether it has been rightfully obtained or not.

γ. *How a Judgment may be rebutted.*

495. A judgment may be rebutted by shewing

(α) Fraud or collusion in the procuring of the judgment.

Def. Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice.

496. (β) That the alleged judgment never had any existence or was void *abinitio*—for instance, that it is a forgery, that the Court had no jurisdiction, &c.

498. (γ) That the judgment has been reversed; as the repealing of a will or letter of administration.

CHAPTER XXVII.

(*b*)—*Depositions and Examinations.*

499. *Examination* is used of the party; *deposition* of a witness; and is generally restricted to the

500. Preliminary evidence given by a witness before a committing Magistrate, but many of the following remarks apply equally to depositions taken in civil cases.

501-2. Depositions are not receivable unless it can be shown that the witness is dead or so infirm as to be unable to attend, or without collusion at such a distance from the Court as would render his attendance inexpedient.

Depositions taken before a committing Magistrate serve a two-fold purpose :—

1st.—To lay sufficient grounds for depriving the accused party of his liberty and committing him for trial.

2nd. As a precautionary measure, to secure evidence in case of the death or corruption of the witness, before the prisoner can be brought to trial.

503. Depositions to be used in a subsequent suit must have been between the same parties.

504. The depositions may have been oral, as in the case of a *viva voce* witness in a civil suit; but it is open to much observation. One mode of proof of such depositions is the production of the Judge's notes, or the oath of some one who was present and heard the evidence delivered. The very words cannot be required.

505. Extra-judicial depositions are not receivable, as where a person has made a *voluntary* affidavit.

506. Before a deposition is admitted in evidence, the existence of the former proceedings must be established by putting in a copy of the judgment.

507. The Courts of Westminster have power in any information or indictment for misdemeanor in India, or in any action brought in such Courts, to issue a *mandamus* to the Judges of the Courts of India, commanding them to examine the witnesses. In such cases the original depositions should be returned.

509. Where it is desirable to secure the testimony of an important witness, who from age or sickness is likely to die, before he can give his evidence, or for the purpose of future litigation, he may be examined according to the English law by filing a bill in equity to *perpetuate testimony*. If the testimony were required by a person out of possession, it was obtained by a bill to take testimony *de bene esse*.

510. The Civil Procedure Code only provides for the immediate examination of a witness in a suit already pending.

511. Depositions relating to a custom, prescription, pedigree, &c., are receivable against strangers under the same conditions as declarations; for if the traditionary declarations be receivable, *a fortiori* must be the same person's depositions which have the additional sanction of an oath.

512. Such depositions must have been made *ante litem motam*.

513. The following remarks have special reference to criminal trials :—

514. 1. The depositions must have been taken in the presence of the accused, or it will not be receivable against him.

2. Depositions taken in a language not understood by the prisoner ought to be explained to him.

515. 3. The depositions must be fully taken.

516. 4. The deposition must be signed by the Magistrate. The signature of the witness is not necessary.

517. 5. The record with the prisoner ought to be forwarded to the superior Court.

518. 6. A deposition might be used as well to contradict as to corroborate a witness.

519. 7. Both the prosecutor and the prisoner may use a deposition to contradict a witness.

520. 8. The death, absence, or sickness of the witness must be satisfactorily proved at the trial before his deposition can be used. In case of search, the search must have been diligent and recent.

521. 9. The deposition itself must be produced at the trial.

522. 10. Before the deposition can be read, it must be proved, by calling the Magistrate or his clerk, before whom it was taken.

523. 11. A deposition is admissible on the trial of the party against whom it was taken, for an offence different from that on the accusation of which it was taken.

524. 12. If the deposition be reduced to writing, parol testimony is inadmissible to vary it.

CHAPTER XXVIII.

EXAMINATIONS.

525. The Magistrate may put such questions to the prisoner as he may consider necessary. The prisoner may or may not answer them. No influence shall be used to extort a confession, but a voluntary one shall be receivable. No oath or affirmation shall be administered to the accused person.

526. The proper time for examining the prisoner is at the conclusion of the deposition, but he may be examined at any time during the proceeding.

Rem. *Examination* is compulsory on the part of the Magistrate; *Confession* voluntary on the part of the prisoner.

527. A prisoner ought not by a strict examination to be entrapped into making a statement; but the Magistrate should examine him to elucidate any portion of a statement which he may make.

528. The examination should be recorded in full, both question and answer, in the words of the prisoner.

530. The Magistrate should sign the examination; the signature of the examinee is not necessary.

532. The attestation of the Magistrate shall be *primâ facie* proof of such examination, and such attestation shall be admitted without proof of the signature to it unless the Court shall see reason to doubt its genuineness—*Cr. P. C., Sec.* 336.

CHAPTER XXIX.

c.—Writs, Warrants, Pleadings, &c.

533. A summons to a defendant upon production, is evidence of service.

534. A rule or order of Court under the hand of the proper officer, is evidence in the Court which issues it. A certified copy should be produced in other Courts: so of warrants.

535. Pleadings, if required to be proved, should be produced in the form of a certified copy; and some evidence should be offered of the identity of the party.

536. Pleadings operate against the party making them as admissions.

536 *a.* A party, to be estopped by his former admissions, must have made the statement with a full knowledge of the circumstances and not by mistake. A party cajoled into an admission, is not bound by it. A party can never be allowed to urge that he made former admissions for the purpose of fraud.

537. Pleadings should be drawn with care, as in many cases a party by pleading over, *i. e.*, omitting to notice a material alleged fact in his adversary's pleadings, is thereby taken to have admitted it.

CHAPTER XXX.

2.—QUASI PUBLIC INSTRUMENTS.

538. Such are memorial rolls, corporations, and perhaps Joint Stock Company's book.

CHAPTER XXXI.

3.—PRIVATE INSTRUMENTS.

541. Private instruments shall be considered,

a. As to their nature and effect.

b. As to their mode of proof.

a.—As to their nature and effect.

540. All private instruments tendered in evidence must be made either by a third person, or by the party against whom they are offered, or his privies.

542. Written declarations and entries by third persons are generally not receivable, because they are neither given on oath nor subjected to cross-examination; except entries against interest in the course of business, &c. (170-192.)

543. Private writings made by the party himself or his privy, are ordinarily contracts or writings in connexion with them.

Contracts are reduced to writing for the express purpose of being afterwards referrible to as the record of the agreement entered into. Contracts under seal, on account of their most solemn character, require a more solemn revocation.

544. By Hindu Law, writing is not necessary to evidence any contract. Not so according to Mahomedan Law.

545. Where the writing of a party is used against him, its effect is that of an admission.

546. Where a party has made an admission under seal, it must be pleaded if it is sought to conclude him by it, if the antagonist has the opportunity of pleading it.

CHAPTER XXXII.

b.—Proof of private Writings.

547. According to Hindu Law, a document in the handwriting of the party himself need not have subscribing witnesses; while one in that of another, ought to be attested.

548. Whenever an instrument can be produced, it should be so done.

549. The writing must be proved to be that of the party purporting to have written it. Where there is a signature, the signature should be proved. Where there is a seal, the execution of the instrument must be proved.

550. Where the instrument is attested, that is, has the signature of the witness as well as of the party; generally speaking, the attesting witness should be called, to prove his own and the party's signature, and that he saw the party sign the same.

551. Where there are several attesting witnesses, it is not necessary to call them all, but one at least ought to be called.

552. But if the document is suspected or impugned, all the attesting witnesses should be called.

553. An attested document may be proved as if unattested, unless it be a document to the validity of which attestation is requisite.

554. But the practice is not permitted except in exceptional cases as the sickness, blindness, insanity, &c., of the witness.

555. The admission of a party of his own execution shall as against himself obviate the necessity of calling witnesses.

556-62. When there is no attesting witness, or he is not called, the writing of the party, if not admitted by himself, must be proved by independent testimony.

(*a*) By one who saw him affix the signature or write the body.

(*b*) By one who knows his writing from having seen him actually write with more or less frequency.

(*c*) By one who has corresponded with the party and acted upon letters received from him.

(*d*) By comparison with any undisputed hand-writing of the party whether relevant to the suit or not.

563. Marksmen are competent witnesses, though unsatisfactory.

564. Where an attesting witness denies his signature or refuses to testify, his attestation may be proved by independent testimony.

565. A document thirty years old, coming from the proper custody, does not require the evidence of an attesting witness to prove it, because the witnesses may be presumed to have died.

566. If an attesting witness may have become blind or insane, or is dead, or has been kept out of the way, proof of any of these facts would afford good ground for the Court to admit the document by independent testimony.

567. Sickness is rather a ground for postponing a trial unless the sickness is of a permanent character. A blind witness should be called, because though he cannot recognize his signature, he may recollect circumstances connected with the execution.

568. When a document is in the hands of the opposite party, timely notice must be given to him to produce it; for he should not be taken by surprise. But where the nature of the action gives the defendant notice that the plaintiff meant to charge him with the possession of the instrument, there can be no necessity for giving him any other notice; as, where a man is charged with having stolen a thing.

570-3. On proof that a party has received notice, if he refuses to produce the document, the party calling for it is entitled to give secondary evidence of its contents—copy or verbal evidence, for there are no degrees of secondary evidence; but if a copy exists, and is producible, the substitution of oral evidence of the contents of the original would be open to strong remarks.

A copy made by a copying machine, affords proof of its own correctness.

571. When a document is produced, it is still incumbent on the party calling for it to prove it; as, by adducing an attesting witness or other proof of the hand-writing, unless the party producing it admits the execution.

572. But if the party producing it claims an interest under it, this is tantamount to an admission by him of the genuineness of the document and supersedes the necessity of further proof.

574. A person is not bound to disclose his own title.

575. Notice to produce a notice is not necessary, for if it were otherwise, the notice might go on *ad infinitum.*

576. Notice to produce may be given either to the party or to the pleader. Nor can the consequences of notice be evaded by transferring the document to a third party.

577. That the document called for is, or ought to be in the possession of the party to whom notice is given, or those respecting whom he has power to compel the production, must be shewn in the first instance.

578. On proof that the original evidence is beyond the jurisdiction of the Court, secondary evidence is receivable.

579. Or on proof of destruction or loss of original document.

580. But there must have been a *bonâ fide* and diligent search for the missing document.

581. A copy of a copy is never received.

582. Where a party has refused to comply, and his adversary has gone into secondary evidence of its contents, he cannot afterwards produce the original for the purpose of rebutting such testimony.—*Edmonds* v. *Challis.*

583. A party who has given notice to produce is not bound to pursue the matter any further; and the opposite party cannot insist upon the document being used, simply because he has had such notice; nor will it thereby become evidence for

himself; but if the party who has given the notice call for the document which is produced in consequence and inspect and thereupon decline to put it in evidence, he thereby makes it evidence.—*Wharam* v. *Routledge.*

583 *a.* If a party refuse to produce a notice, he cannot afterwards produce it as his own evidence.—*Laxton* v. *Reynolds.*

CHAPTER XXXIII.

I.—HOW INSTRUMENTS ARE USED IN PROOF.

584. 1.—How proofs are to be supplied by the parties.

2.—How they are to be applied by the Judge.

1.—HOW PROOFS ARE TO BE SUPPLIED BY THE PARTIES.

(1) On whom rests the burthen of proof, *i. e.*, who is to supply the evidence.

(2) What quantity of evidence need be produced, *i. e.*, what amount of evidence must be offered in support of an issue.

(3) The quality of the proof which it is necessary to produce.

(1) ON WHOM RESTS THE BURTHEN OF PROOF.

585. The Judge settles the issues to be proved, but the parties must produce the evidence to prove these issues.

586. The law is quiescent until certain facts are established, to which it can attach certain consequences. Hence, it is for him who seeks to attach such consequences to bring forward proof of the facts which will warrant the attachment.

591. Thus, in criminal prosecutions, the prosecutor must prove all that is necessary to attach penal consequences, although in order to do so, he must have recourse to negative evidence.

587. By the Mahomedan Law, when a defendant simply denies the truth of the plaintiff's case, the plaintiff must prove the affirmative; but when the defendant pleads some special matter in defence, he must prove his plea.

588. As a general rule, by the English law of evidence, the party who asserts the affirmative is bound to prove it, not only because it is incumbent on him to establish those facts to which he submits that certain legal consequences ought to be attached, but also from the inconvenience, difficulty and delay, which attend the attempt to prove a negative.

589. The party against whom the verdict will be given, if no evidence were offered on either side, will have to make out his case by evidence.

590. But it is the affirmative in substance rather than in form which is to be looked to, for otherwise an ingenious pleader might frequently shift the burthen of proof from himself to his adversary by the form of his pleadings. Thus, it is an established rule that the *onus probandi* of self-acquisition lies on the claimant when a question of succession to property, alleged on the other part to have belonged to a family, which is admitted on both sides to have been generally joint and undivided in estate, arises between the heirs of a deceased ancestor.

Where there is a presumption of law in favor of innocence that things are rightly done, &c., it is incumbent on the party alleging that a duty has not been performed to prove it; nor can he shift the burthen of proof by pleading affirmatively that his adversary has been guilty of a culpable omission.

So when bastardy of a child born in wedlock is to be proved, illegitimacy must be affirmatively proved, as by shewing that the father was at sea or in a foreign country for a certain period. So when death has to be proved, the proof cannot be shifted by pleading that the party is not alive.

592. When a Statute in the enacting clause contains an exception and fixes a penalty, then the party seeking to

criminate another under that Statute is bound to shew that the case does not fall within the exception; but when there is no exception within the enacting clause, but in another distinct and separate clause, or if even it be in the same Section, but not incorporated with the enacting clause by words of reference, the *onus probandi* is shifted.

593. So in an action on a contract, if the promise is not absolute, but contains any qualification, the plaintiff must prove that the defendant does not come within the qualification; as, where a carrier undertakes to carry goods safely, fire and robbery excepted.

594. When the means of proof are peculiarly within the knowledge of the defendant or prisoner, a general sense of convenience shifts the burthen of proof, as, where a pedlar stands charged with trading without license.

But the rule in question is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he stands charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true.

595. When a party seeks to avoid responsibility for an act on account of some exceptive circumstance, he must prove that circumstance. Thus a party seeking to avoid a contract on the ground that it was obtained from him by duress or fraud, must prove such duress or fraud.

596. The plaintiff is not bound to negative the defence in the first instance. The defendant may fail in establishing his defence, and therefore it would have been time wasted for the plaintiff to attack a case which falls from its own weakness. But the plaintiff may generally call evidence in reply, but

such evidence must be confined to negative specific facts sworn to by the defendant's witnesses, the proof of which he could not be supposed to anticipate.

597. The party is also entitled to the aid of the comments and arguments of the pleader.

CHAPTER XXXIV.

2.—QUANTITY OF PROOF.

598. The following need not be proved:

(1) That which the Court is bound to take judicial notice, for it would be superfluous.

(2) That which is admitted by the opposite pleadings.

(3) That which the opposite pleader may admit in Court or beforehand by agreement for the purposes of trial.

(4) Superfluous matter set forth in the pleadings.

600. The respective issues are to be proved; but proof must be confined to the issue. It is the duty of the Judge to determine with reference both to the pleadings and the evidence.

601. Thus in an action for assault, when the defence is not guilty, the defendant will not be allowed to shew that the plaintiff committed the first assault, which in law would justify the defendant's conduct. Had he relied on the evidence, he should have pleaded the facts.

602. Hence, evidence of collateral facts is, not to be received especially in criminal cases ; thus in an action for not supplying the plaintiff with good beer, the defendant cannot shew that he had supplied other parties with good beer.

603. Evidence of the character of a party is generally not receivable, except when it is directly put in issue, as in an action for defamation or on a trial for any crime ; and the character

of the prosecutor may become a material question in a criminal trial, as the character of the prosecutrix for chastity on a charge of rape. When evidence of character is admissible, it must be of a general nature, so as to shew what reputation the person bore among his neighbours. In civil cases, character is of importance only where it affects the amount of damages. But in cases of contracts evidence of character is irrelevant. In criminal cases, the prisoner is always permitted out of motives of humanity to call witnesses to his character, such evidence being taken into consideration in awarding the punishment, but not in determining guilt or innocence.

The prosecutor may not call witnesses to shew the prisoner's bad character in the first instance, but he may do so in reply, when the prisoner on his defence calls witnesses to character, whom it is important to the prosecutor to rebut.

604. Evidence of character is receivable to impeach or support the veracity of witnesses ; for it is never immaterial to the Judge to have the real character of the witnesses, on whose story he is to found his judgment, as fully before him as possible.

605. But when a collateral fact is material to the proof of any issue, as when the *factum probandum* is not susceptible of direct proof, evidence of the collateral fact is necessarily admissible.

607-8. But in crimes the essence of which consists in guilty knowledge or intention, other circumstances may be adduced to shew such guilty knowledge or intent.

609. It is sufficient if the *substance* of the issue be proved ; that is to say, the real substantial question raised between the parties. But it is not necessary for the plaintiff, however strong his case may be, to allege or establish more than what is requisite to entitle him to the decree which he seeks.

610. So if a defendant pleads two matters, each of which is a complete defence, such as denial of the fact, justification,

excuse, &c., it will be sufficient for him to prove only one of such issues.

611. In criminal trials a man may be convicted of theft, if the proof of burglary fails. A man charged with murder, of manslaughter.

612. If the substance of the issue be not proved it will be fatal to the party on whom the proof of the issue lies. In cases where the burthen of proof rests manifestly on the plaintiff, if the plaintiff do not establish the special grounds on which he comes into Court, there is no necessity to investigate the ground on which the defence rests.

613. Hence a party shall not recover upon one title by his pleadings, and another by his proof.

613. *a.* But where a party charges fraud and discloses on his plaint another title wholly independent of that fraud (which fraud he fails to prove) the charge of fraud may be regarded as surplusage, and he may recover on his other allegations.

613. *b.* Hence a contract, when proved, must correspond with the effect of the contract as alleged in the pleadings. So, a material alteration in an instrument when produced, constitutes such a variance from the allegation of the contract, that the party cannot recover.—*Master* v. *Miller*. An unauthorized alteration in a Bill of Exchange after acceptance, whereby the payment would be accelerated, even though made by a stranger, avoids the instrument. The onus of accounting for the variation lies upon the party producing the instrument.

614. But where the action is founded on tort, it is no variation to prove only a part of the wrong alleged.

615. Where a pleading contains an allegation of *time*, it must be proved whenever it is material or matter of description, as in cases of burglary, where it is the essence of the crime that the offence should have been committed between the hours of 9 P. M. and 6 A. M.

616. But when the time is immaterial, it need not be proved as laid. Thus in trespass, proof of trespass on any day before the filing of the plaint, will suffice. But it is advisable for the pleader to state his facts as nearly true as possible.

617-8. So also with respect to allegations of *place* and *value.*

619. It is a general rule that all matters of description must be proved as laid. If a man be charged with stealing brass pots, he cannot be convicted on proof of having stolen silver pots. If the matter be described with greater peculiarity than necessary, it must be proved as laid.

620. So the description of the *person* is sometimes material, as on a charge of larceny and embezzlement by a *servant.*

CHAPTER XXXV.

(3)—QUALITY OF PROOF.

621-2. The fundamental rule that the best evidence which the case admits of shall be produced, does not require the production of the greatest possible *quantity* of evidence, as for instance, the repetition of proof of the same fact by various witnesses; for in almost in all matters the proof of a fact may be established by a single witness except in charges of treason and perjury; but it is framed to prevent the introduction of any evidence which raises the supposition that there is better evidence behind by which he might prove the same fact. Thus, depositions only become evidence when the deponent himself cannot be produced. The contents of a written document must be taken from the paper, not from a copy or the treacherous memory of man speaking for it.

624. But the rule does not exclude secondary proof of an original instrument by verbal testimony rather than by a copy.

625. But it requires that the evidence should come from the proper source, *i. e.*, that the documents should be produced from their natural place of custody.

627. Wherever written instruments are appointed by law or by compact of parties to be the repositories and memorials of truth, any other evidence is excluded, either as a substitute for such instrument, or to contradict or to alter them.

Parol evidence may be offered with relation to written instruments in one or other of these three aspects :—

a. In opposition to written evidence.

b. In aid of written evidence.

c. As independent evidence of a fact of which there may exist written evidence.

CHAPTER XXXVI.

a.—Where parol evidence is offered in opposition to written evidence.

Here its object is :—

(*a*) To supersede.

(*b*) To contradict or vary.

(*c*) To subvert, to add to, or subtract from the written evidence.

628-29. (*a*) Where the policy of the law has required the evidence of a particular fact to be in writing, or the parties have agreed that there shall be a written record of their intentions, the want of such evidence can *never be supplied by oral evidence*, as in the case of wills, or of promissory notes when they are, on the face of them, made payable on demand.

629. (*b*) Parol evidence is *also never received* to contradict or vary written evidence. Thus when upon the face of a

document a party appears to be bound as principal, he cannot shew orally that it was really agreed he should be merely a surety.

630 *a*. But the rule is otherwise in equity, where the true relation of the parties and the knowledge of that relation may be shewn.

631-32. Documents may be ambiguously worded, and the ambiguity may be *patent* or *latent*. The former is caused by the inherent defect of the language used—as an omission—and is patent to all the world, as where in a will, an estate to ———. The latter kind would not be apparent to any indifferent reader, unacquainted with the facts, and though the language used is unambiguous, it may fit several conditions of facts equally well.

633. Parol evidence is never admitted to explain a patent ambiguity, while it is admissible to explain a latent one.

634. But a document is not patently ambiguous, because it is unintelligible to an uninstructed person. Hence foreign languages, terms of art or writing in cipher, obsolete terms and the like will not create an ambiguity. It is ambiguity in point of fact rather than in form to which the rule applies.

635. *Inaccuracy of expression* ought not to be confounded with *ambiguity*. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate.

636. It is the duty of the judge to give effect to the terms of the document, if by a sound reasonable construction, he can remove an apparent ambiguity.

637. (*c*) Parol evidence *is receivable* to shew that a written instrument had never any legal existence.

638. *a*. Thus, evidence is admissible to shew that the document was fraudulently concocted.

639. *β*. That the contract was made in furtherance of some object forbidden by law.

640. γ. That the contract was made upon some immoral consideration.

Rem. 1. In these cases the Court interferes not for the sake of the defendant, but because it will not lend its aid to the plaintiff.

643. δ. That the instrument was obtained by duress.

645. ε. That the parties were laboring under some disability, as infamy, marriage, insanity, idiotcy, or intoxication.

Rem 2. The law was different formerly as to insanity, idiotcy and intoxication, especially the last. *Gore* v. *Gibson*; *Moulton* v. *Camroux*.

646. ζ. That there never was any consideration.

647. η. That there was a consideration though it has been omitted in the contract.

648. *Rem.* 3. According to the Common Law, total want or failure of consideration is a defence. Partial failure, however small may have been the consideration, cannot be enquired into. In equity, partial failure may be pleaded as evidence when the failure is so gross as to be evidence of over-reaching as in the case of bargain with heirs, *post obit* transactions and the like.

649. See ante, 91-3.

650. θ. That by some accident or mistake, the instrument does not express the intentions of the parties.

Rem. 4. As a general rule, Courts of Equity alone can take cognizance of such cases, and as the Company's Courts are Courts of Equity, they should in this case exercise an equitable jurisdiction.

651. ι. That though the instrument is not vitiated in its inception, yet that it never has in fact had any legal effect or validity, because it was not the intention of the parties that it should commence to have any effect or validity until a particular event which has not risen, as in *escrow*.

652. *k.* That the written instrument has no longer any operation inasmuch as it has been subsequently totally waived or discharged.

653. *Rem.* 5. Every contract must be dissolved by the same means which rendered it binding. So Statutes can only be repealed by the Legislature, deeds by deeds, simple contracts by any writing or verbal agreements.

654. *Rem.* 6. Nothing previous to the execution of a contract, or which passed at the time of the execution of a contract, can be introduced for the purpose of varying that contract; but after the contract has been reduced to writing, it is competent to the parties at any time before breach of it, by a new contract not in writing either to waive, dissolve or annul the former agreement, or in any manner add to or subtract from, or vary or qualify the terms of it, and thus make a new contract.—*Viraperumal Pillai* v. *Miller*.

CHAPTER XXXVII.

b.—When parol evidence is offered in aid of a written instrument.

656. It is always admissible to give effect to a written instrument

(*a*) By establishing its authenticity.

(*b*) By applying it to its proper subject matter.

(*c*) By explaining expressions capable of conveying a definite meaning by virtue of that explanation.

(*d*) By annexing customary incidents.

(*e*) By rebutting presumptions.

657. (*a*) Where there are attesting witnesses, or where the signature, hand-writing, &c., is to be proved, before the document is receivable, parol testimony is always given in aid of the document.

658. (*b*) The difficulty of application may arise from a latent ambiguity which may be removed by parol evidence.—*Macdonald* v. *Longbottom*.

659. Questions of this nature generally arise with regard to Wills. The following are the rules laid down by Wigram for the construction of Wills.

α. A testator is always presumed to use the words in which he expresses himself according to their strict and primary signification unless the contrary appears from the context, in which case the sense in which he appears to have used them must be the sense in which they should be construed.

β. Where there is nothing in the context of a will, from which it appears that a testator has used the words in which he has expressed himself, in any other than that strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstance, the words of the will shall be interpreted in their strict and primary sense and no other.

γ. If under the above circumstances the words are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstance of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to these circumstances, they are capable.

δ. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering the writing or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court the proper meaning of the words.

ε. For the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine

the quantity of interest he has given by his will, the Court may enquire into every material fact, relating to the person who claims to be interested under the will and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs.

ζ Where the words of a will aided by evidence of the material facts of the case are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in the case mentioned below, η) will be void for uncertainty.

η. Notwithstanding the rule of law which makes a will void for uncertainty as in ζ, Courts of law, in cases when the object of a testator's bounty or the subject of disposition is described in terms which are applicable indifferently to more than one person or thing, admit extrinsic evidence of intention to make certain the person or thing intended.

Rem. The foregoing Rules may be applied to the construction of all private writings.

660. (*c*) *As to explaining.* When words used in ancient characters, deeds, &c., have become obsolete the practice which has long obtained with reference to the enjoyment under such instrument, is a reasonable source for gathering the original meaning of the instrument.

661. So in mercantile contracts, terms are used familiar to mercantile men, and which have by consent and use obtained a technical signification, parol evidence of such meaning is admissible to apply it to the proper subject matter.

662. But this principle should not be carried too far.

663. Parol evidence of usage is not admissible to vary or contradict what is plain.

664. (*d*) *As to annexing customary incident.* Where a contract made about a thing is silent, as to a well-known prevalent custom with respect to that thing, it is presumed that the parties contracted with reference to that well-known custom.

665. Thus, a tenant was allowed to take away the growing crops after the expiration of the lease, on proof that such was the custom of the country, his lease being silent on the point.

666. But no such evidence of custom can be given when the instrument is not silent. For it is open to the parties to exclude the operation of the custom by express agreement.

667. (*e*) *To rebut a presumption.* Parol evidence is admissible to shew that the presumption raised from a written instrument is faulty and not well-founded. Thus the law presumes that a legacy to a creditor is in satisfaction of a debt; and that a portion advanced to a child is in ademption of a legacy to her. In both these cases, parol evidence may be given to rebut the presumption.

CHAPTER XXXVIII.

c.—*Where parol evidence is offered as original and independent testimony.*

669. Where a writing is only a *collateral memorial of a fact*, and not required by law or agreed to by the consent of parties, parol evidence of the same fact may be received. Thus the fact of the marriage may be proved by the parties present at the ceremony, as well as by the registry. The fact of payment proved orally notwithstanding the existence of a receipt.

670. Where a document which might have been pleaded as an estoppel, has not so been, parol evidence is admissible to contradict the instrument.

671. Parol evidence may always be given of inscriptions on walls, tomb-stones, mural tablets, sassanums let into buildings, and the like which, from their nature, are incapable of removal.

CHAPTER XXXIX.

2.—HOW PROOFS ARE TO BE APPLIED BY THE JUDGE.

672. All evidence is either direct or indirect (circumstantial). It is comparatively seldom that any case can be exclusively proved by direct testimony.

673. In dealing with circumstantial evidence, the Judge should guard against an undue preponderance being given to any one or more circumstances: to see that the whole are received by him without omission: and that the chain of evidence is complete without any broken or faulty links. The province of the Advocate is to prove; that of the Judge to infer.

674. Some indirect evidence is in its nature conclusive, as an *alibi*; but generally speaking, indirect or circumstantial evidence affords the materials from which the mind of the Judge will draw inferences.

675-6. These presumptions are either

(1) *Of law*—those which the law appoints as necessarily to be drawn from certain given facts and are divided into,

a. *Irrebuttable*—such as are conclusive.

b. *Rebuttable*—such as may be rebutted.

(2) *Or of fact*—those which the law does not say shall be drawn, but which will naturally be drawn from given facts.

CHAPTER XL.

(1.)—PRESUMPTIONS OF LAW.

678. *a. Irrebuttable.*

(*a*) A person under 14 is by English Law incapable of committing a rape. In this country, a little earlier.

680. (*b*) A child under 7 cannot commit a felony.

(*c*) A sane man of years of discretion contemplates the natural and probable consequences of his own acts. Thus the intent to kill is presumed from the deliberate violent use of a deadly weapon.

682. *Doctrine of intention.* Where an act indifferent in itself, if done with a particular intent becomes criminal, then the intent must be proved and found: but where the act is itself unlawful, that is *primâ facie* and unexplained, the proof of justification or excuse lies on the defendant, and in failure thereof, the law implies a criminal intent.

684. (*d*) A man knows the law. *Ignorantia facti excusat: ignorantia juris non excusat.*

685. (*e*) The proceedings of Courts of Justice are correctly made.

686. (*f*) Length of time affords grounds of presumption; as the force of title by prescription; reception of deeds, wills, writings, &c., after thirty years without proof, and hence the force of statutes of limitation.

687. (*g*) A person purchasing goods implies a promise to pay a fair and reasonable price for them.

688. (*h*) What a man has deliberately done is true, on this is founded the doctrine of estoppel.

689. (*i*) By the Law of England a bond or deed has been executed for a valid consideration.

690. (*j*) The wilful neglect of a defendant to plead within the time appointed by law, is taken conclusively against him; as a confession of the plaintiff's right of action.

691. (*k*) Some damage results from an unlawful act.

692. (*l*) A child born to a husband and wife who have co-habited together, no impotency being proved, is legitimate, although it be shown that the wife is guilty of infidelity at the time.

693. *b* *Rebuttable presumptions.*

694. (*a*) A person is innocent till he is proved guilty.

695. (*b*) A promissory note has a good consideration.

696. (*c*) Presumption against irreligion.

697. (*d*) Everything has been rightly done. This arises in three different ways :—

α. Where from an act, prior acts are presumed.

β. Where from prior acts, posterior ones are presumed.

γ. Where the extremes being proved, the intermediate proceedings are presumed.

698. (*e*) Where a party is proved to have acted officially in a public capacity, his appointment is presumed.

699. (*f*) Possession and user give the owner the right of property.

700. (*g*) Non-user also gives rise to presumptions. Thus a bond on which no demand has been made nor interest paid for twenty years, is presumed to have been paid.

701. (*h*) Presumptions with regard to Insurance Law. When a vessel has sailed and no tidings have been heard of her within a reasonable time, she shall be presumed to have foundered. So, if a vessel founders within a short time after sailing without any adequate cause, she shall be presumed to have been unseaworthy at the commencement of the risk.

702. (*i*) The law regards the order of nature. Hence idiotcy, lunacy, impotency, are not to be presumed.

704. (*j*) There are also presumptions arising from the ordinary conduct of mankind, habits of society, or usages of trade.

703. (*k*) Presumptions also arise from our knowledge of the moral world. On this principle stands the probative force of entries made against interest, admissions and confession.

So money advanced by a parent to a child, is presumed to be a gift and not a loan.

705. (*l*) The occupation of a farm, as a tenant, implies an agreement to farm well.

706. (*m*) Hiring for service, where no term is expressed, is presumed to be a hiring for such term as the custom of the country sanctions. A reasonable price will be presumed when there is no special contract for the price of the goods. Cancellation of a document may be presumed from parties tearing off names, seals, &c. Partners are interested in equal shares. In adoption, want of evidence of publicity will afford strong presumptions against the fact.

706. (*n*) It is a presumption that things once proved to have been in a particular state, continue so. Thus when a person is shown to have long acted in the capacity of agent, the continuance of the agency is presumed. So of mortgage, partnership, insanity; and so where a debt is once proved, payment is not presumed unless a stronger counter-presumption arise from lapse of time.

707. (*o*) So the continuance of human life—the *onus* of proving death lies on the party asserting it. But there arises a presumption of death after 7 years (12 years according to Hindu Law and 90 years according to Mahomedan Law) absence without the person being heard of. But there is no presumption as to the precise time of death.

708. (*p*) Nor is there now any presumption as to the probable survivorship of a given individual when all perished by one common calamity.

709. (*q*) The strongest presumption is made against a wrongdoer. *Armory* v. *Delamirie,* the case of the chimney-sweeper and the jeweller. In the case of *Annesley* v. *The Earl of Anglesea,* Monteney B. observed, that the defendant's causing the plaintiff, the claimant of the title and estate,

to be kidnapped and sent to sea and afterwards endeavoring to take away his life on a charge of murder, spoke more strongly against him than a thousand witnesses.

710. (r) So in cases where an instrument of evidence is suppressed, altered, or fabricated.

711. (s) But this presumption is not conclusive, especially in cases where a false case is met by a false evidence.

712. (t) Much less is it applicable in criminal cases : for an innocent man, when appearances are against him, will sometimes have recourse to falsehood and fabrication, or suppression of evidence in the hope of escaping.

713. (w) Presumptions of International Law.

714-5. α. That of *domicile.* Every person is presumed to have contracted with regard to the *lex loci contractus*, not the law of his own domicile.

716. β. A marriage contracted in a foreign country will be presumed to have been celebrated with the ceremonies required by the law of that country, and to be valid and binding.

CHAPTER XLI.

(2.)—NATURAL PRESUMPTIONS.

718. In this class of presumptions, the law draws no inference necessarily, nor directs any such to be drawn ; but the force of the class arises naturally from the effect of the testimony upon the mind of the judge.

719. They are wholly independent of any artificial legal relations and connections, and differ from presumptions of mere law in this essential respect—that those depend upon or rather are a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind from the course of nature and the ordinary habits of society. Such pre-

sumptions are therefore wholly independent of the system of laws to be applied to the facts when established.

720. Natural presumptions are of most ordinary and striking occurrence in criminal cases, where the party accused is not connected with the offence charged, by his own confession or by the direct evidence of witnesses. When this is not the case, he must be so connected by one of three ways :

a. By evidence derived from *things* called *real evidence.*

b. By his own *antecedent conduct.*

c. By his own *subsequent conduct.*

a.—Real evidence and the presumptions arising from them.

721. Things sometimes, though rarely, are in themselves conclusive as a woman murdered, with a bloody mark of a *left* hand on her *left* arm. Here is conclusive evidence of the presence of some third party at or after the murder. So a dead man with a discharged pistol lying by his side, the bullet causing death being found too large for the pistol, is conclusive against suicide. So an *alibi* is conclusive of innocence.

722. But generally speaking, real evidence only gives rise to presumptions, not necessary conclusions. Thus, documents written on paper, the watermark of which is later than the date of the execution, would seem to afford a conclusive proof of forgery ; the presumption though stringent, is not conclusive.

723. A burglar gained admittance by opening a window with a penknife ; a piece of the blade was found sticking in the window-frame. It corresponded with the remainder of the broken blade found in the prisoner's pocket ; the presumption was inevitable.

724. The presumption of theft or felonious receivership arises from the recent possession of stolen property, but it may be weakened by concomitant circumstances; such as length of time, &c.

725. But where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the Court are warranted in concluding it as the same, unless the prisoner can prove the contrary. Thus a man being found coming out of another's barn, and upon search, corn being found upon him of the same kind with what is in the barn, is pregnant evidence of guilt. This class of presumptions is incapable of enumeration. It must be left to the sagacity of the student to discover the connection, to draw the inferences, and not to strain those inferences beyond their legitimate limit.

726. *b. Conduct of the party antecedent to crime.*

Here we must consider

(*a.*) *His motives for committing the action.*

(*b.*) *His means of committing it; and*

(*c.*) *His opportunity.*

727. The absence of such circumstances, or the presence of contrary circumstances raises corresponding presumptions in favor of innocence; as when a party accused of murder has a direct interest in the continuance of the life of the party supposed to have been murdered, or where one charged with murder by poisoning, had herself partaken of the poisonous food.

Presumptions against the accused arise:

728. On a charge of arson, from proof of recent insurance of the goods or premises to a large value.

730. From proof of preparations or previous attempts to commit the crime: as purchasing weapons, preparing a place of concealment or means of escape.

731. From spreading rumours of deceased's sickness previous to his death.

732. From threats or express declaration of intention to commit a particular act or crime.

729. But caution must be used in respect to the weight attached to these presumptions.

c.—Presumptions from subsequent conduct.

733. It is upon this principle that the practice of parties is considered to afford good evidence of the real meaning of a contract in doubtful cases. Thus in *Davis* v. *The Trustees of the Civil Fund*, the expressions, despatches, and conduct of the East India Company, for a long series of years, subsequent to the institution of the Civil Fund, were held conclusive against them as to the interpretation to be put upon the ambiguously-worded contract.

734. But it is in criminal matters that the most forcible illustrations are to be found. Thus, a change in the circumstance of the accused, as his becoming suddenly rich, his squandering unusual sums of money and the like, are circumstances calculated to attach suspicion.

735. So presumptions arise from attempts to evade justice, as by flight, the obliteration of marks, subornation of evidence, stifling justice by bribery, collusion with officers, &c.

736. As to flight, it is a maxim that he who flies, confesses his guilt. But the infirmative circumstances which weaken this presumption are numerous. Thus, weakness of judgment, a desire to avoid vexation, the character of the tribunal, popular feeling against the accused, &c. Take the case of Sir Walter Lyrrell, after killing William Rufus.

737. *John Donellan's* trial for the murder of Sir Theodosius Baughton, is an instance.

738. As to destruction of marks take *R.* v. *Cook*, where the prisoner had cut to pieces the body of his creditor who had called to obtain payment of a debt and attempted to dispose of it by burning. In *R.* v. *Greenacre*, the prisoner cut up the body of his victim and conveyed the members to various distant localities. In the case of *Webster*, the deceased was

entirely consumed by his murderer, a doctor, in his laboratory. Concealment is one of the most ordinary evidences of guilt; thus the discovery of stolen property buried under ground, thrown into wells, hid in roofs or walls, affords a presumption of theft or guilty receipt as the case may be, which puts the accused to the proof of his innocent possession.

739. A presumption arises from fear manifested by the deportment of the party.—*Eugene Aram's Case.* The most innocent man may well exhibit symptoms of fear at the novelty and danger of his situation, when apprehended on a false charge, while the hardened malefactor contemplates his condition with indifference even when his guilt is manifest. Blushing, paleness, trembling, faintness, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, stammering, faltering of the voice, &c., are among the physical symptoms, indicative of fear. But three classes of infirmative circumstances should be considered :—

1*stly*. The emotion of fear may not be present in the mind of the individual, since several of the above symptoms are indicative of disease, surprise, grief, anger, &c.

2*ndly*. The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the offence imputed. It may be occasioned by the consciousness of another crime, the discovery of which may bring down punishment.

3*rdly*. Fear may arise from the consciousness that though innocent, appearances are against him.

The presence of fear may be evidenced by acts showing a desire for secrecy. But these are capable of explanation :—

1*stly*. It is perfectly possible that the design of the person seeking secrecy may be altogether innocent. The lovers of servants, for instance, are often mistaken for thieves.

2ndly. The design, if criminal, may be so with a different object; as where a man, with a view of making sport by alarming his neighbours, dresses himself up to pass for a ghost.

740. A presumption is sometimes raised from the silence of a party which seems to fall under the head of deportment. But little reliance can be placed on this circumstance. A prudent man will generally prefer silence till he is actually put upon his defence at the trial.

741. Such are the principal sources whence arise presumptions. It must again be observed that caution is necessary against the danger of straining presumptions too far.

CHAPTER XLII.

CONSTRUCTION OF STATUTES.

744. 1. *Construction according to letter.*— The intention of the Legislature is always to be gathered if possible :—

1*st.* From the words used by the Legislature.

2*nd.* From a reference to contemporaneous decisions, *i. e.*, decisions on the subject at or near about the passing of the Act. This source of exposition applies chiefly to the case of old Statutes.

745. In determining on the meaning of a Statute we should consider, as laid down in *Heydon's case* :—

1*st.* What was the law *before* the passing of the Statute.

2*nd.* What was the mischief which the new Act was intended to remedy or repress.

3*rd.* What was the remedy applied.

4*th.* What is the true reason of the remedy.

Having satisfied himself on all these points, it is the duty of the judge to make such construction as shall suppress the mischief and advance the remedy.

746 (1) The intention of the Legislature is to be considered from a consideration of the *whole* Statute.

747. (2) The primary or golden rule, for the interpretation of Statutes is to give all the words of a Statute their plain ordinary meaning, unless absurdity or injustice would be the result of so doing.

748. *Poisonous is that construction which corrupts the words of the text. A man ought not to rest upon the letter only, but rely upon the sense.*

749. (3) The construction should be such that notwithstanding apparent contradictions or incongruities, the whole Statute shall stand.

750. (4) Where Statutes are on the same subject-matter all are regarded as one Act; they are all to be read together, and so construed that the whole may stand.

751. (5) When the same words are repeated in several parts of the Statute, they are to be used in the same sense in all places, except indeed when they apply to different subject matter.

752. (6) Technical words must be taken in their technical sense.

753. (7) Words may be transposed or read parenthetically, but they cannot be imported for the purpose of making sense.

754. (8) Words must be construed with reference to the subject-matter of the Act.

769. (9) False orthography or grammar does not vitiate an instrument; nor the singular instead of the plural.

755. (10) Words are not to receive an extended signification beyond their ordinary signification, in order to comprehend a case supposed to fall within the intention of the Legislature.

756. (11) But this does not apply to ancient Statutes, which have been occasionally extended to cases not expressly within their words.

757. (12) Judges are not to presume, but to collect the intention of the Legislature.

758. (13) Words are sometimes to be taken distributively.

759. (14) When the words of a Statute expressly refer to those of another, such reference in point of fact makes the two Statutes one.

760. (15) Affirmative words do not take away a privilege.

761. When a Statute is simply declaratory, and does not introduce any new enactment, it may be extended.

763. 2. *Construction according to the Spirit.*—Acts are divided into remedial and penal. When the object is once clear, the construction is to be such as shall advance the remedy and suppress the mischief. The following principles may be borne in mind in construing according to the spirit.

764. (1) Acts affecting public rights, imposing any burden on the public, such as stamps, tolls, ferry dues, and the like; Acts derogating from the right of private property, are not to be extended, but receive a strict construction. So also of private Acts conferring extraordinary powers, such as Railway and other great Joint Stock Company's Acts. The words of grants are to be taken most strongly against him who advances the grant as his protection.

764. *a.* (2) No Statute shall have any retrospective effect unless the Legislature expressly or by necessary implication says, it shall have such an effect. Cases of *Kureemkhan and Mary Ravelles.* Statutes are occasionally made retrospective.

765. (3) In deciding on the spirit of an Act, the consequences of any particular exposition will be most properly considered and weighed for the purpose of avoiding absurdity; but after the Court has arrived at a determinate conclusion,

as to what is the fit construction that the meaning and contents require them to put upon an Act of Parliament, the judges have nothing to do with the consequences of the decision.

766. Effect cannot be given to an intention not expressed.

767. The parts of a Statute are *preamble* and *clauses*; neither the title nor the side-notes form any part of the Act; nor can they be looked into for the purpose of construing the Act. The preamble may be looked into to ascertain the subject-matter of the enactment, but not for the purpose of extending the enacting clauses. It may however restrain them when they are obscure.

768. Clauses are *separate* and *substantive* or *dependent*. *Provisoes* are always dependent. Clauses may support, explain or restrain each other; and provisoes may narrow previous clauses.

769. The above remarks apply equally to all written documents.

770. The great principle of interpretation of all instruments seems to be that effect is to be given to the intention of the framers, rather than that the instrument shall be void.

771. Hence is the doctrine of *Cypres*, meaning *near this*, which is applied in the case of wills; especially in the case of charitable bequests. Where there is on the face of the will a particular intention of the testator which cannot be carried out and also a general intention which can, the latter shall have effect.

CHAPTER XLIII.

APPRECIATION OF EVIDENCE.

772. What arguments, and in what degree, amount to proof in each case cannot be accurately defined. Sometimes the number of witnesses, sometimes their rank and authority, sometimes the unanimous voice of public fame establish the proof of the matter under investigation.

773. Where civil rights are in issue a less degree of probability may be safely adopted as a ground of judgment than in criminal trials, where liberty or even life is at stake. In civil cases, where evidence is nearly balanced, a mere preponderance on either side, may be sufficient to turn the scale.

774. In criminal trials, the evidence, in order to convict, must be conclusive. But evidence inconclusive in itself, may become conclusive through the defect of proof on the other side, or by the act of the party himself.

775. The judge should always decide according to what is alleged and proved.

776. In direct personal testimony, discrepancies often trifling in themselves, when compared with the great mass of evidence in the case, ought not to be made the ground of acquittal or disbelief.

777. They are often a test of truth; for the usual character of human testimony is substantial truth under circumstantial variety; and a close and minute agreement induces the suspicion of confederacy and fraud.

CHAPTER XLIV.

CREDIT DUE TO WITNESSES.

778. In determining on the credit due to witnesses, the judge should have regard to the following considerations:—

1. *Their integrity.*
2. *Their ability.*
3. *Their number and consistency with each other.*

(4.) *The conformity of their testimony with experience.*

(5.) *The conformity of their testimony with collateral circumstances.*

779. (1.) A judge is to weigh but not to number witnesses. The testimony of an infamous witness is not to be rejected on

that account; but the circumstance is one of the deepest moment in weighing the amount of credit due to him, and as it is difficult to detect the motives which may influence a corrupt and depraved mind, it is for the jury to consider whether the apparent want of motive to deceive be sufficient to accredit an exceptional witness, and whether some assurance of the actual absence of such a motive be not necessary to warrant their confidence.

782. To entitle the evidence of an accomplice to credit, confirmation is required upon some point, affecting the person of the prisoner or prisoners charged—but not so according to English law.

783. Admissions by convicted accomplices, not approvers, cannot be received against the co-defendants.

784. According to Mahommedan law, the evidence of accomplices, even if corroborated, is insufficient for a conviction though sufficient to warrant a presumption.

785. The manner or demeanor of a witness, affording to courts of original jurisdiction one vast superiority over courts of appeal, the functions of which should be confined to a supervision of the rulings of law, ought ever to be closely watched.

786. An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or understanding the question for the purpose of gaining time to consider the effect of his answer, precipitancy in answering without waiting to hear or understand the question, his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction is impossible, affectation of indifference, are all to a greater or less extent obvious marks of *insincerity*.

On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony were false, &c., are strong indications of *sincerity.*

787. It is with regard to these matters that cross-examination is usually very effective.

788. 2. By *ability* is meant not only his intellectual ability, but also his ability to speak the truth from his accurate acquaintance with the facts which he reports. This depends on the opportunity the witness has had of remarking the fact; his accuracy of discernment, his retentiveness of memory; his powers of narration.

789. 3. A single witness, if there is no reason to doubt his veracity and accuracy, his ability and integrity, is sufficient in law to prove any fact, except treason and perjury in which crimes two at least are necessary. Where direct testimony is opposed by conflicting evidence or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material.

790. 4. The consistency of testimony is also a strong and most important test for judging of the credibility of witnesses. Where several witnesses concur in their statement of a series of particular circumstances, such coincidences exclude all apprehension of mere chance and accident, and can only be accounted for by supposing that the testimony is true or that the coincidences are the result of concert and conspiracy; and if the latter be disproved, which may be done by considerations either extrinsic of their testimony, as their character and situation, their remoteness from each other, &c., or intrinsic as by a minute and critical examination and comparison of the testimony, the former follows as a necessary consequence.

791. 4. In ordinary cases, if a witness were to state that which was inconsistent with the known course of nature, he would probably be disbelieved. But as experience shews that events frequently occur which would antecedently have been considered most improbable from their inconsistency with ordinary experience, and as their improbability usually arises from want of a more intimate and correct knowledge of the causes which produced them; mere improbability can rarely supply a sufficient ground for disbelieving direct and unexceptional witnesses of the fact, where there was no room for mistake.

792. 5. Direct testimony is not only capable of being strengthened or weakened to an indefinite extent by its conformity on the one hand or inconsistency on the other, with circumstances collateral to the disputed fact, but may be totally rebutted by means of such evidence.

794. The judge will receive great help in coming to right decisions upon the evidence submitted to him by studying the following analysis of Bentham, the object of which is:—

1. To give a view of the cases in which falsehood is incapable of being prevented.
2. To save the judge from imputing mendacity, when there is none.
3. To facilitate the recognition of mendacity where it exists.
4. To suggest copies for examination and interrogation with a view to elicit truth. In judging of direct testimony, the two most valuable qualities are:—

   I. *Correctness* and

   II. *Completeness.*

795. 1. *Incorrectness* or *falsehood* under the various designations of *perjury*, *forgery*, *fraud*, *personification*, *swindling*, according to the mode in which it exhibits itself, may be expressed by

(1) *Positive assertion.*

(2) *Negation.*

(3) *Alleged or pretended ignorance.*

796-8. 2. Falsehood may consist,

(1) *In quantity.*

(2) *In quality*, or

(3) *It may be circumstantial.*

799. Incorrectness is as frequent as mendacity, the difference between them being constituted by *intention.*

800. 3. *Incorrectness* is attributable to two sources .—

(1) *Intellectual* and,

(2) *Moral.*

801. (1) The intellectual faculties broughtin to operation in the delivery of testimony are :—

(*a*) *Perception.*

(*b*) *Judgment.*

(*c*) *Memory.*

(*d*) *Expression*; *i. e.*, the language in which the impressions are conveyed.

802. (*a*) *Perception* may have been rendered faint or indistinct by old age; attention may have been rendered indifferent; the light in which the object was placed, or the sounds which reached the ears may have been faint.

803. (*b*) *The judgment* may have been formed under any of the above circumstances; it may have been hasty, negligent and erroneous by want of knowledge, general or particular. The want of relative knowledge may be indicated by condition in life, by immaturity of age and by insanity.

804. (*c*) Failure of *memory* may be produced by some original faintness or indistinctness in the acts of perception as above described or by lapse of time. From the weakness of memory may result two different and in some respects opposite effects—*non-recollection* and *false recollection.* Sometimes

imagination takes the place of recollection as in the case of hallucination and the like.

805. (*d*) By an infelicity in the expression, the fruit of the most correct perception and the most retentive memory, may be rendered abortive.

Recollection having its basis on truth, can scarcely be removed from that basis altogether. Expression on the other hand, having no necessary tie with the ideas they were intended to represent, the aberration is capable in this case of being so complete, that the fact as actually expressed may be the exact opposite of the fact as intended to be expressed. But the aberration arising from the former cause, is not likely to be so frequent or natural as that arising from the latter; for if the aberration be apparent, it will naturally receive correction from the remarks and questions put by the judge; whereas a defect of recollection is little capable of receiving any such assistance.

806. (2) The *moral* faculties brought into play in the delivery of testimony are :—

a. *Veracity* and its opposite, *mendacity*.

b. *Attention* and its opposite, *temerity* or *negligence*.

a. As to mendacity. See §§ 795-99.

807. *b.* *Temerity* arises where one states that which he is not fully persuaded is false, yet the falsity of which he would have perceived had he bestowed on it due attention.

808. The moral causes of incorrectness from the grossest mendacity down to the most venial mistake, are to be sought for in the wide region of motive, bias, self-interest, hatred and the like.

809. II. *Incompleteness.* Minuteness of detail is one of the greatest securities of veracity. Under particularity of statement are included two qualities :—

1. *Individuality.*
2. *Circumstantiality.*

A relation is never particular enough unless the fact be individualized, that is fixed and circumscribed in respect of time and place.

810. 3. The following are other tests of veracity which it is worth while to remember :—

1. Recollectedness and unpremeditatedness.
2. Suggestedness or unsuggestedness.
3. Interrogatedness.
4. Distinctness.

811. The external securities for veracity are :—

1. The fear of punishment.
2. The obligation of an oath or affirmation.
3. The fear of shame and infamy.
4. Interrogation.
5. The reception of testimony in a written form.
6. Notation, *i. e.*, making the written evidence a solemn record.
7. Publicity.
8. Counter-evidence.
9. Investigation, *i. e.*, the discovery of one piece of evidence by means of another, or of information not strictly *evidence*.

CHAPTER XLV.

CIRCUMSTANTIAL EVIDENCE.

815-819. See § 293-305.

820-1. To determine whether the facts offered are relevant is a delicate and difficult task, and each case must depend upon its peculiarities. In doing so, the judge must consider whether there is a reasonable and proximate connection, not a conjectural and remote one, between them and the facts which they are offered to prove.

822. The *corpus delicti*, the fact that the offence has been committed, must be established. Lord Hale mentions a case where a man was missing for a considerable time, and there was strong ground for presuming that another had murdered him and consumed the body to ashes in an oven ; the supposed murderer was convicted and executed, after which the other returned from sea.

823. Hence the extreme danger of convicting in cases of homicide unless the body be found and identified. The evidence on this point must ordinarily be direct, though there may be cases when the body cannot be found as in murders committed at sea when the body is thrown overboard and the like. There are cases however in which the *corpus delicti may* be proved by circumstantial evidence.

822. Thus, where the mother and reputed father of a bastard child had cast the infant into a dock, and the body of the infant was not afterwards seen ; as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of the child, observed, that it was possible, that the tide might have carried out the living infant, and on this ground the jury acquitted the prisoners. And so where the prisoner confessed a murder, and pointed out human bones, which he alleged to be those of the persons murdered, the Court held that as the bones did not admit of identification, this was not a sufficient finding of the body to warrant a capital punishment.

824. The *corpus delicti* may *always* be *disproved* by circumstantial evidence. Thus where a charge of rape was fully sworn against an old man turned of sixty, and a concurrent testimony of her father and mother and some other relations, the accused successfully defended himself by showing that he had for many years been afflicted with a rupture, so hideous and great as to render sexual intercourse impossible.

825. . The *corpus delicti* once proved, all other points in the case may be proved by circumstantial evidence, as for instance

to fix the place of the commission of the offence, even to show the presence of crime.

826. But when the evidence connecting the prisoner with the *corpus delicti* is exclusively circumstantial, the conclusions from such proof must exclude to a moral certainty, every other hypothesis than that of guilt.

829. Circumstantial evidence is never to be relied on where direct evidence of the same fact is wilfully kept back.

830. Where the judge has a doubt, the prisoner should have the benefit of it.

831. It is here that evidence of character may give the measuring cast. Where there is no doubt, evidence of character can be of no weight.

CHAPTER XLVI.

CONFLICTING TESTIMONY.

832. In cases where evidence of facts or witnesses deposing *bonâ fide* is irreconcileable, it must be first ascertained whether the apparent inconsistencies and incongruities may not without violence be reconciled, and, if not, to what extent, and in what particulars, the adverse evidence is irreconcileable; and then, by careful investigation and comparison to reject that which is vicious. If the statements of witnesses be found to be irreconcileable, it is necessary to distinguish between the misconceptions of an innocent witness, which may not affect his general testimony, and wilful and corrupt misrepresentations which destroy his credit altogether. The presumption of reason as well as law in favor of innocence, will attribute a variance in testimony to the former rather than to the latter origin. In estimating the probability of mistake and error, much must depend on the natural talents of the adverse witnesses, their quickness of perception, strength of memory, their previous habits of general attention, or of attention to particular subject-matters, a comparison of the means and opportunity which

the witnesses had for making observations, of the circumstances which were likely to excite and engage their attention, and of their reasons and motives for attending, Where the testimony of conflicting witnesses is irreconcileable, and cannot be attributed to incapacity or error, all those considerations which have been applied as tests of the credit and veracity of witnesses uncontradicted, are also tests of credibility. Character for integrity, ties of consanguinity, friendship, expectation of future gain, the interest which the witness may possess in a similar question, the bias and prejudice which may arise in favor of a party from connection in the way of profession or trade, membership of any description, should also be considered.

833-4. Rebuttable presumptions of any kind may be encountered by presumptive as well as direct evidence. The following rules may be laid down as a guide where presumptions conflict.

835. (1) Special presumptions take precedence of general ones. Thus, the presumption of innocence is a very general one and rather favored presumption,—but guilt, may be proved by presumptive evidence.

836. (2) Presumptions derived from the course of nature are stronger than casual ones. Thus, on an indictment for stealing a log of timber, it would probably be considered a sufficient answer to any claim of presumptive evidence, or even to the testimony of an alleged eye-witness, to show that the log in question was so large and heavy that ten of the strongest men could not move it.

837. Presumptions are favored which give validity to acts.

838. Where two difficulties in construction present themselves, the rule is of two evils choose the less.

839. Witnesses are to be *weighed*, not numbered.

CHAPTER XLVII.

CONCLUSION.

840-3. It will be seen from all that has been said that the duty of the judge with regard to evidence is of a three-fold nature :—

1. *To exclude everything that is not legitimate evidence.* Here the judge must bring into play all those rules which exclude hearsay ; *res inter alios actæ,* statements not on oath or solemn affirmation, and the like.

2. *To ascertain clearly what the evidence is which he has before him.* A knowledge of language and its structure in general, and especially an accurate familiarity with the vernacular in which the evidence is delivered are essential.

3. *To estimate correctly the probative force of that evidence.* Men will be more or less successful in this task according to the constitution of their intellects. Experience, care, and a conscientious uprightness will do much; but more depends on endeavouring to conduct one's deliberations upon scientific principles, not upon any vague imagination of what is equitable or the like in each particular case.

844. In drawing conclusions from the facts before him, the judge has two points as to which to be on his guard.

1. *That his arguments are legitimate in form,*—that he is not the victim of any fallacy in reasoning. For this, Whateley, Bentham, Mill and Morgan's treatises on Logic should be studied.

845. 2. *That he should not start with the assumption of guilt or innocence, and examine the evidence with a view to see whether such assumption is supportable.* He should examine the evidence disinterestedly to see what its scientific probative force amounts to.

846. In coming to a final decision the judge will do well to bear in mind two maxims :—

It is better that ten guilty men should escape than one innocent man suffer.

He imperils the innocent who spares the guilty.